

Missouri Attorney General's Opinions - 1984

Opinion	Date	Topic	Summary
2-84	Jan 19		Opinion letter to The Honorable John A. Birch
4-84	Mar 28	BLIND, COMMISSION, PENSIONS, SCHOOLS. DEPARTMENT OF SOCIAL SERVICES. OPTOMETRY.	A licensed optometrist may, in the course of examining the human eye, detect the existence of a pathological condition, defect, malfunction or malformation of the human eye. The Department of Social Services must accept the results of an optometric examination to determine a person's eligibility for benefits paid from state funds if the optometrist is authorized by law to perform the examination upon which eligibility is based.
5-84	Mar 6		Opinion letter to Mr. Larry Ferrell
6-84	Apr 23		Opinion letter to The Honorable James F. Antonio, CPA
8-84	Apr 12		Opinion letter to The Honorable John A. Birch
10-84	Apr 27	STATE EMPLOYEES' RETIREMENT SYSTEM.	Members of the Missouri State Employees' Retirement System who are retired and receiving benefits may be employed by a department, other than the General Assembly, on a part-time basis, i.e., less than fifteen hundred hours per year, and continue to receive retirement benefits.
11-84	Apr 12		Opinion letter to The Honorable John D. Wiggins
12-84	May 21		Opinion letter to Dr. Arthur L. Mallory
13-84	July 20	EDUCATION. EDUCATION OF HANDICAPPED ACT. EDUCATIONAL PROGRAMS. MENTAL HEALTH. MENTALLY DISTURBED CHILDREN. MENTALLY HANDICAPPED PUPILS. MENTAL ILLNESS. MENTAL RETARDATION. SCHOOL DISTRICTS. SCHOOL CONTRACTS.	Missouri law requires the Department of Mental Health to provide special educational services to school-aged, inpatient children who reside outside the school district of their domicile and whose condition renders them unable to leave the Department of Mental Health facility to which they are assigned. The Department of Elementary and Secondary Education has the authority to monitor the provision of educational services by the Department of Mental Health, for compliance with the Education of the Handicapped Act. The Department of Mental Health is required to provide a "due process" hearing either prior to or following the discharge of a school-age child when the Department of Mental Health acts as the educational provider. If the Department of Mental Health is not acting as the educational provider, the local school district or the Department of Elementary and Secondary Education, must provide such due process hearing. The Department of Mental Health need not continue treatment or care of school-age children discharged by the Department of Mental Health pending an "educational

		SCHOOLS FOR SEVERELY HANDICAPPED CHILDREN.	discharge" hearing. Section 162.970.4, RSMo, requires the Department of Mental Health to pay the serving district the amount by which the per pupil cost of special educational services exceeds the amount received from the domiciliary district and other state monies for severely handicapped school-age children in facilities or programs of the Department of Mental Health when the child is educated by the local district under Section 162.970.1, supra.
14-84	May 14	DEPARTMENT OF SOCIAL SERVICES. MEDICAL TECHNICIANS. NURSES.	No violation of the Nursing Practice Act occurs when a certified medication technician, who does not hold himself out as a nurse licensed to practice in Missouri, provides care in an Adult Day Health Care Program that is also an Associated Adult Day Health Care Program, so long as the care associated with a licensed long-term care facility is restricted to the administration of medication, excluding injectables other than insulin.
16-84	June 27		Opinion letter to The Honorable David Doctorian
19-84	July 3		Opinion letter to The Honorable James F. Antonio, CPA
20-84	Apr 12		Opinion letter to The Honorable Danny Staples
21-84	June 27		Opinion letter to The Honorable James R. Strong
22-84	May 4	AGENT. DEPUTIES. DEPUTY SHERIFFS. EXTRADITIONS. GOVERNOR. SHERIFFS.	Section 548.243, RSMo Supp. 1983, does not authorize the state to reimburse a sheriff for expenses incurred by an extradition agency in returning a fugitive to Missouri who has waived extradition; and, if the Governor appoints an extradition agency as an agent to receive a fugitive under Section 548.221, RSMo 1978, then such agency could be compensated by the state pursuant to Section 548.241, RSMo Supp. 1983, upon the approval of the Governor.
24-84	Jan 12		Opinion letter to The Honorable Estil Fretwell
28-84	Apr 12		Opinion letter to The Honorable M. Roger Carlin
30-84			Withdrawn
32-84	Mar 9	DIVORCE. DOMESTIC VIOLENCE. FEES. MARRIAGE DISSOLUTION FEES. MARRIAGE LIGENSE FEES. SHELTERS FOR VICTIMS OF DOMESTIC VIOLENCE.	A Missouri, not-for-profit corporation operating as a shelter for victims of domestic violence and receiving funds under Sections 455.200 to 455.230, RSMo Supp. 1983, may use such funds to establish a network of safe homes in private residences. Such funds may be used to provide medical and personal items if such are incident to the residential services and facilities provided by the shelter.

33-84	Aug 15	DRIVERS LICENSE. DRIVERS LICENSE REVOCATION. DRUNKEN DRIVING.	With respect to the chemical testing procedure of Sections 577.020, et seq., RSMo Supp. 1983, for the purpose of determining whether a person was driving a motor vehicle in an intoxicated or drugged condition, that: (1) The legislature has given motorists the right to refuse to take a chemical test, including a blood test, upon arrest for driving while intoxicated, (2) This right to refuse to exercise at any time prior to submitting to the test, (3) Once the individual has clearly and unequivocally indicated his refusal, no test should be conducted, even if the individual initially indicated a willingness to take the test, (4) In the absence of such a refusal so long as a hospital or its employee is taking a blood sample pursuant to the request of a law enforcement officer who has arrested the defendant, the hospital and its employees are immune from liability except for acts which are wanton, willful or grossly negligent, and (5) Sections 577.020 to 577.041, RSMo Supp. 1983, do not diminish or alter the authority of law enforcement officials to require chemical tests of the blood of a person under arrest as outlined in Schmerber v. California, 384 U.S. 757 (1968).
34-84	Mar 21		Opinion letter to The Honorable David L. Steelman
37-84	Feb 16		Opinion letter to The Honorable E. J. Cantrell
38-84	Aug 1		Opinion letter to Paula V. Smith
39-84	Feb 16		Opinion letter to The Honorable Harriett Woods
43-84	June 20	CITY JUDGE. CITIES, TOWNS, AND VILLAGES. SOCIAL SECURITY.	For the purposes of Sections 105.300, et seq., RSMo Supp. 1983, providing for social security tax reporting a municipal judge selected pursuant to Section 479.020, RSMo 1978, is an employee of the municipality. Further, it would not be possible for a municipality to provide for municipal judge services on a contractual basis in a manner as to exempt the municipality from treating such person as an employee for social security reporting purposes.
44-84	Apr 16	ELECTION EXPENSES. ELECTIONS. WATER SUPPLY DISTRICTS.	Public water supply districts organized under Sections 247.010 to 247.220, RSMo 1978, and Supp. 1983, are "special districts", under the definition of that term in Section 115.013(24), RSMo Supp. 1983, and must share election costs pursuant to Section 115.065, RSMo Supp. 1983, and the words "all costs" in Section 115.065.1 and 2, RSMo Supp. 1983, should be read as "all proportional costs" as defined in Section 115.065.4, RSMo Supp. 1983. Election authorities may not allocate the fixed costs of the election authority among special districts or political subdivisions which present questions or candidates in any election, pursuant to section 115.065, RSMo Supp. 1983.

48-84	July 26	ASSESSMENT BOOKS. ASSESSORS. INCORPORATION BY REFERENCE. LAND DESCRIPTIONS. STATE TAX COMMISSION.	A parcel or locator number may incorporate by reference an accurate land description in the county recorder of deeds' office, and such constitutes an accurate description of the land for purposes of Section 137.225.2, RSMo 1978.
49-84	Apr 9	LANDLORD AND TENANT. SECURITY DEPOSIT.	The provisions of House Bill 175 (82nd General Assembly, First Regular Session), Section 535.300, RSMo Supp. 1983, are not applicable to non-dwelling unit rental property.
50-84	Apr 30		Opinion letter to Ed Daniel
51-84	Feb 8		Opinion letter to The Honorable Nelson B. Tinnin
52-84	Feb 6	JUDGES. ELECTIONS. SECRETARY OF STATE. CANDIDATES.	The Secretary of State may accept declarations of candidacy received by mail from circuit judges seeking retention pursuant to Article V, Section 25(c)(1), Missouri Constitution.
53-84	Aug 13		Opinion letter to The Honorable Roger B. Wilson
54-84	Apr 12		Opinion letter to The Honorable James R. Strong
56-84	Mar 22		Opinion letter to Mr. David A. Baird
60-84	May 1	ADMINISTRATIVE AGENCIES. CITIES, TOWNS AND VILLAGES. CONSTITUTIONAL CHARTER CITIES. PUBLIC RECORDS. SUNSHINE LAW.	The Personnel Board of the City of Springfield is part of an administrative agency and, pursuant to Section 610.120, RSMo Supp. 1983, may have access to arrest records closed under Section 610.105, RSMo Supp. 1983.
61-84	June 7	BANKS AND BANKING. ESCHEATS. UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT.	The State of Missouri has a demonstrable legal interest in the contents of safe-deposit boxes recovered from closed national banks that were located in Missouri prior to closing.
62-84	Oct 29	STATE EMPLOYEES' RETIREMENT SYSTEM.	A person who served in the General Assembly for two (2) biennial assemblies and who was a regular state employee for seven (7) years before terminating on or after July 1, 1981, is not a fully vested member of the Missouri State Employees' Retirement

			System under Section 104.335.2(2) of S.C.S.H.C.S.H.B. 1370, Eighty-Second General Assembly, Second Regular Session.
63-84	May 16		Opinion letter to Mary-Jean Hackwood
66-84	Mar 22		Opinion letter to Dr. Arthur L. Mallory
68-84	June 11		Opinion letter to The Honorable Thomas I. Osborne
71-84	Apr 30		Opinion letter to The Honorable Ron Auer
79-84	Aug 27	COORDINATING BOARD FOR HIGHER EDUCATION. GRANT OF PUBLIC MONIES. MISSOURI STUDENT GRANT PROGRAM. STATE SCHOLARSHIPS. STUDENT FINANCIAL ASSISTANCE PROGRAM.	The award of a Missouri student grant to a recipient who intends to undertake a career in religious work does not violate Article I, Section 7, of the Missouri Constitution.
82-84	July 18	STATE EMPLOYEES' RETIREMENT SYSTEM.	Members of the Missouri State Employees' Retirement System who terminate state employment on or after April 1, 1984, but before October 1, 1984, are not entitled to the benefit of the graded vesting schedule found at Section 104.335.3 S.C.S.H.C.S.H.B. of 1370, 82nd Gen. Ass., 2d Reg. Sess.
87-84	Oct 18	JUDGES. JUDICIAL RETIREMENT. RETIREMENT. STATE EMPLOYEES' RETIREMENT SYSTEM.	The retirement compensation provided by Section 476.530, RSMo 1978, is fifty percent (50%) of the compensation provided by law at the time the judge in question leaves office.
88-84	July 26	STATE EMPLOYEES' RETIREMENT SYSTEM.	Section 476.515.2 of S.C.S.H.C.S.H.B. 1370, Eighty-Second General Assembly, Second Regular Session, which provides for benefits for surviving spouses of judges who have remarried and who were not eligible for such benefits prior to the amendment of Section 476.515, is unconstitutional and cannot be given effect. Furthermore, Section 476.515 may not be applied to a surviving spouse of a judge who remarried after October 1, 1984, if the deceased judge ceased to hold office prior to that date.
89-84	Aug 1	AGRICULTURAL LAND.	A Missouri citizen may use a loan acquired from a non resident alien to buy Missouri farm land when the loan is secured by a deed

		ALIENS.	of trust. In the event of foreclosure, however, the trustee may not convey title to the alien lender, his agent, trustee, or other fiduciary.
91-84	Aug 23		Opinion letter to Mr. Homer E. Sayad
92-84	July 13	DEPARTMENT OF PUBLIC SAFETY.	Water patrolmen have the authority to set up sobriety check points for investigatory stops to determine if boat operators are intoxicated during both daylight and night-time hours, provided that patrolmen do not board any boat for that purpose during nighttime hours. Water patrolmen also have the authority to ask boat operators for certificates of registration and to make arrests for equipment violations determined through observation at sobriety checks conducted during night-time hours.
96-84	June 11	CONSTITUTIONAL AMENDMENT. ELECTIONS. LEGAL NOTICES.	Legal notices of elections on proposed constitutional amendments should be published for four (4) consecutive weeks in counties having but one newspaper, as is specified in Article XII, Section 2(b), Missouri Constitution.
99-84	July 3		Opinion letter to The Honorable Patrick Hickey
103-84	Aug 13		Opinion letter to The Honorable Carole Roper Park
107-84	Aug 2		Opinion letter to John A. Pelzer
108-84	Aug 16	ELECTIONS. INITIATIVE PETITION. PETITIONS. VOTERS.	Persons who sign an initiative petition showing an address different than that at which they were formerly registered are not "legal voters" for purposes of Article III, Section 50, Missouri Constitution (1945), nor are they "registered voters" for purposes Section 116.060, RSMo Supp. 1983.
111-84	Aug 27		Opinion letter to The Honorable Harry Hill
114-84	Oct 18		Opinion letter to Mary-Jean Hackwood
115-84	Aug 29		Opinion letter to The Honorable James C. Kirkpatrick
118-84	Sept 10		Opinion letter to The Honorable James C. Kirkpatrick
119-84	Oct 18		Opinion letter to The Honorable James W. Murphy
121-84	Oct 17	INDUSTRIAL DEVELOPMENT CORPORATIONS ACT. POWERS. REFINANCING.	An industrial development corporation organized under the Industrial Development Corporations Act, Chapter 349 of the Revised Statutes of Missouri, 1978, as amended, has the power and authority to issue revenue bonds and to loan the proceeds therefrom to a corporation for the purpose of refinancing and extinguishing outstanding indebtedness previously incurred by such corporation in connection with the purchase, construction, extension or improvement of a "project" as defined in the

			Industrial Development Corporations Act.
122-84	Sept 18		Opinion letter to The Honorable James C. Kirkpatrick
123-84	April 2, 1985 (Amended.)	DEPARTMENT OF NATURAL RESOURCES. ENVIRONMENTAL CONTROL. OIL & GAS COUNCIL. WATER POLLUTION. WELLS.	The laws of the State of Missouri provide adequate authority to the Department of Natural Resources to carry out a program for the control of underground injection wells as described in the Program Description submitted to the EPA and as required by 40 CFR Part 145.
126-84	Nov 14	HEALTH AND EDUCATIONAL FACILITIES AUTHORITY. SOCIAL SECURITY. STATE DEPARTMENTS.	The Health and Educational Facilities Authority organized under Chapter 360, RSMo 1978 & Supp. 1983, is an instrumentality of the state for purposes of 42 U.S.C.S. Section 418 (L.Ed. 1978 & Supp. 1984) and Sections 105.300 to 105.440, RSMo 1978 & Supp. 1983.
127-84	Oct 15		Opinion letter to Dr. Shaila Aery

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 19, 1984

OPINION LETTER NO. 2-84
(CORRECTED)

The Honorable John A. Birch
Representative, District 17
10106 N.E. 72nd Street
Kansas City, Missouri 64152

2

Dear Representative Birch:

This letter is in response to your questions asking as follows:

Does a county planning and zoning commission created pursuant to any of the following: Sections 64.010, 64.215, 64.510, or 64.800 RSMo have the power to subpoena witnesses to appear before it?

Does the county governing body in a second class county have the power to issue subpoenas for witnesses to appear before the county governing body?

Does the county governing body in a second class county have the power to command the county clerk to issue subpoenas for witnesses to appear before a county planning and zoning commission which is in existence in such a county?

Our review of the sections you cite and related sections indicates four sections which specifically authorize subpoenas for witnesses. Section 64.120, RSMo 1978, with respect to certain first class charter counties, provides that the chairman of the county board of zoning adjustment created pursuant to such section has the authority "to administer oaths and compel the attendance of witnesses" Section 64.281, RSMo 1978, with respect to county boards of zoning adjustments in certain non-charter first-class counties specifically authorizes the chairman to "compel the attendance of witnesses" Section 64.660, RSMo 1978, with respect to certain third and fourth class counties specifically

The Honorable John A. Birch

authorizes the chairman of the county board of zoning adjustment "to compel the attendance of witnesses" Further, Section 64.870, RSMo 1978, with respect to certain counties which have opted for alternative county planning and zoning, authorizes the chairman of the county board of zoning adjustment "to compel the attendance of witnesses"

We have found no express language authorizing a county planning and zoning commission to compel the attendance of witnesses.

We do note, however, that the last sentence of Sections 64.030 and 64.225, RSMo 1978, provides: "The commission shall have such other powers as may be appropriate to enable it to perform its duties." The last sentence of Sections 64.540 and 64.810, RSMo Supp. 1983, provides as follows: "The commission shall have such other powers as may be necessary and proper to enable it to perform the duties imposed upon it by law." In the absence of express statutory authorization for the county planning and zoning commission to issue subpoenas, the answer to your first question turns on whether the power to issue subpoenas is such an "other power" appropriate or necessary to the commission fulfilling its duties.

Our task in rendering this opinion is to seek the intent of the legislature. State v. Burnau, 642 S.W.2d 621 (Mo. banc 1982). The rule of ejusdem generis -- that general words following specific words will be construed as limited to things of the same general character as those specified -- is an aid in determining legislative intent. Capra v. Phillips Investment Company, 302 S.W.2d 924 (Mo. banc 1957). The rule is explained in Betz v. Columbia Telephone Company, 24 S.W. 224 (Mo. App. 1930), where the court interpreted "such other injuries" as follows:

Where a statute enumerates various injuries which are compensable unconditionally, and is immediately followed by a provision for [such] "other injuries," the last injuries provided for will be read as ejusdem generis with and not of a kind different from those specifically named. They partake of the same kind and character as injuries specifically enumerated Id. at 227. [Emphasis added.]

Sections 64.030 and 64.225, RSMo 1978, and Sections 64.540 and 64.810, RSMo Supp. 1983, generally provide authority for the commission to "appoint such employees as it may deem necessary for its work" and to "contract with planners and other consultants" In addition, these sections generally authorize the commission to expend county funds to the level appropriated by the county governing body.

The Honorable John A. Birch

Applying the ejusdem generis rule, we are of the opinion that the "other powers" to which Sections 64.030, 64.225, 64.250, 64.810 refer are powers which are of like character to those enumerated in these sections. The power of the commission to compel the attendance of witnesses is not granted by the legislature by the cited language, in our opinion, since such power is not similar to the powers specifically enumerated.

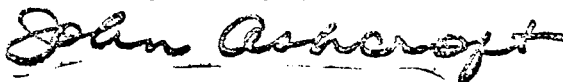
In response to your second question, we note that Section 49.210, RSMo 1978, authorizes county courts to compel the attendance of witnesses. No appellate court decisions have been found interpreting Section 49.210. We believe that Section 49.210 by its own terms grants subpoena authority to county courts only to the extent that the testimony sought to be compelled is relevant to action being considered by the county court as a decision-making body.

In answer to your third question, we note the well-settled rule which limits the powers of non-charter counties to those powers expressly or impliedly granted by law. Pearson v. City of Washington, 439 S.W.2d 756 (Mo. 1969). Thus, where the legislature has prescribed the manner in which a power may be exercised, the right to exercise the power is limited to the manner prescribed. Id.

Section 49.210, as we have indicated, provides that a county court may award process and compel the attendance of witnesses "touching any matter in controversy before them." (Emphasis added.) The commission is composed of certain enumerated persons (Sections 64.020, 64.215, 64.520 and 64.805) including one county judge. The county planning and zoning commission is not the county court. Matters which come before the county planning and zoning commission cannot be said to be before the county court. Therefore, we are of the opinion that Section 49.210 does not grant the county governing body the power to issue subpoenas or to command the county clerk to issue subpoenas for witnesses to appear before a county zoning and planning commission.

In coming to the afore-mentioned conclusions, we in no way opine as to the power of the county court to enforce its subpoenas.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

BLIND, COMMISSION, PENSIONS, SCHOOLS:
DEPARTMENT OF SOCIAL SERVICES:
OPTOMETRY:

A licensed optometrist may, in the course of examining the human eye, detect

the existence of a pathological condition, defect, malfunction or malformation of the human eye. The Department of Social Services must accept the results of an optometric examination to determine a person's eligibility for benefits paid from state funds if the optometrist is authorized by law to perform the examination upon which eligibility is based.

March 28, 1984

OPINION NO. 4-84

J. H. Frappier, Director
Department of Consumer Affairs,
Regulation and Licensing
101 Adams Street
Jefferson City, Missouri 65101

FILED

4

Dear Mr. Frappier:

This opinion is in response to the following questions:

1. Under Section 336.010, RSMo 1978, does Section 336.010, RSMo 1978, which defines the practice of optometry in this state, authorize a duly licensed optometrist to examine a human eye to determine whether there is, in that eye, a pathological condition, defect, malfunction or malformation?
2. Does the answer to question one depend in any manner on whether the optometrist has been certified as qualified to administer topically applied diagnostic pharmaceutical agents under Section 336.220, RSMo 1978?
3. If the answer to question number 1 is "yes", with or without relation to the answer to question number two, is it legally permissible for any department of state

J. H. Frappier, Director

government, including the Department of Social Services, to refuse to accept the results of such an optometric diagnosis to determine eligibility for benefits paid from state funds.

We begin our inquiry by surveying statutes and regulations relevant to your question. Section 336.010(1), RSMo Supp. 1983, defines the practice of optometry in part pertinent to your questions as follows:

The examination of the human eye, without the use of drugs, medicines or surgery, to ascertain the presence of defects or abnormal conditions which can be corrected by the use of lenses, prisms or ocular exercises;

Section 336.210, RSMo 1978, provides:

No official, employee, board, commission or agency of the state of Missouri, county, municipality, school district or other political subdivision of the state shall discriminate between persons licensed under this chapter and chapter 334, RSMo [relating to physicians, surgeons, and physical therapists], when requiring or recommending services which legally may be performed by persons licensed under this chapter and by persons licensed under chapter 334.

Section 336.220.1, RSMo Supp. 1983, provides:

The state board of optometry may adopt reasonable rules and regulations providing for the examination and certification of registered optometrists who apply to the board for authority to use topically applied diagnostic pharmaceutical agents in the practice of optometry. As used in this section, the term 'diagnostic pharmaceutical agents' means anesthetics, mydriatics, and cycloplegics.

J. H. Frappier, Director

Rule 13 CSR 40-91.030(1)(A), effective November 11, 1978, a regulation promulgated by the Department of Social Services, Division of Family Services, Bureau for the Blind, provides:

Visual eligibility requirements: Prevention of blindness is a medical care program; therefore, visual eligibility for services is based on a diagnosis by an ophthalmologist or physician skilled in diseases of the eye of one of the following conditions: a progressive eye disease; a malformation or malfunction of all or part of an eye; or central visual acuity without correction of 20/200 or less in one eye.

From the facts you have provided us, it appears that the Bureau for the Blind, Division of Family Services, Department of Social Services, refuses to accept examinations made by optometrists licensed pursuant to Chapter 336, RSMo, for determinations of visual eligibility for the Prevention of Blindness Program. Your three questions seek to determine whether or not the Bureau for the Blind must accept the results of an optometric examination which identifies a visual impairment sufficient to qualify a person for the Prevention of Blindness Program conducted by the Department of Social Services, Division of Family Services, Bureau for the Blind. For the reasons which will be set out herein, it is our opinion that an examination by a licensed optometrist which reveals a progressive eye disease, a malformation or malfunction of all or part of an eye, or central visual acuity without correction of 20/200 or less in one eye must be accepted by the Bureau for the Blind as a determination that such a person is eligible for the Prevention of Blindness Program.

I.

AUTHORITY OF OPTOMETRISTS TO EXAMINE A HUMAN EYE
TO DETERMINE THE EXISTENCE OF A PATHOLOGICAL
CONDITION, DEFECT, MALFUNCTION OR MALFORMATION

Section 336.010 authorizes an optometrist to examine the human eye to discover the presence of those defects which can be corrected "by the use of lenses, prisms or ocular exercises." We believe it is self-evident that the determination of whether or

J. H. Frappier, Director

not a defect or abnormal condition of the eye can be corrected by the use of lenses, prisms, or ocular exercises is dependent upon an initial assessment of the nature of the defect or abnormality. Only after this initial assessment is completed can it be determined if the abnormality or defect can be corrected by the use of lenses, prisms or ocular exercises.

A rudimentary excursion into the field of optometry reveals that it is the function of lenses, prisms and ocular exercises to correct for some, though certainly not all, defects, malfunctions and malformations of the eye. M. Dowaliby, Practical Aspects of Ophthalmic Optics, 3-5 (1972). Pathological conditions of the eye and certain other conditions (e.g., brain disorders which affect vision) generally cannot be corrected by lenses, prisms or ocular exercises. G. Fonda, Management of the Patient with Subnormal Vision, 1-7 (1970).

Thus, although Section 336.010 does not authorize a duly licensed optometrist to examine the human eye specifically for the purpose of diagnosing every existing defect, malfunction, malformation, or pathological condition, it is within the authority of an optometrist to examine a human eye to determine whether a condition which limits visual acuity is correctable by the use of lenses, prisms or ocular exercises.

We caution here that this opinion must not be read as broadening the authority of optometrists beyond the limits expressed in the statutes. An optometrist is not authorized to diagnose finally a specific disease of the eye or to treat a disease of the eye or a malformation or malfunction of the eye which is not correctable with lenses, prisms or ocular exercises. Instead, the optometrist is qualified by education and authorized by law to determine the visual acuity of an eye, and, in so doing, may detect the presence of a pathological condition, malformation or malfunction which is not correctable with lenses, prisms or ocular exercises in the course of examination. Upon detection of a condition which the optometrist cannot treat, we believe appropriate optometric practice is to refer the patient to an ophthalmologist or physician skilled in diseases of the eye.

J. H. Frappier, Director

II.

RELEVANCE OF THE ABILITY OF AN OPTOMETRIST TO ADMINISTER TOPICALLY APPLIED DIAGNOSTIC PHARMACEUTICAL AGENTS UNDER SECTION 336.220, RSMo SUPP. 1983

As you question notes, the General Assembly amended the laws relating to optometrists in 1981 to permit certain optometrists who are certified by the Board of Optometry, to employ topically applied diagnostic pharmaceutical agents in the practice of optometry. Section 336.220, RSMo. Supp. 1983. Section 336.220.4 provides:

Any provision of Section 336.010 to the contrary notwithstanding, a registered optometrist who is examined and so certified by the state board of optometry may administer topically applied diagnostic pharmaceutical agents in the practice of optometry.

Section 336.220.5 provides:

Any optometrist authorized by the board to administer diagnostic pharmaceutical agents shall refer a patient to a physician licensed under chapter 334, RSMo, if examination of the eyes indicates a condition, including reduced visual acuity, which requires medical treatment, further medical diagnosis, or further refraction. This referral is not required on unknown or previously diagnosed conditions Any optometrist violating this section shall be subject to the provisions of Section 336.110. [Emphasis added.]

Because certain conditions of the eye can only be detected when the eye is dilated (by the use of a mydriatic) or the focus is briefly "paralyzed" (by the use of cycloplegics) the clear language of Section 336.220 evinces an intention on the part of the General Assembly to permit board certified optometrists to use diagnostic pharmaceutical agents. The use of such agents enables the optometrist to determine the nature of the defect or abnormal condition affecting the vision of a patient more accurately. In the course of an optometric examination using diagnostic pharma-

J. H. Frappier, Director

ceutical agents, if a certified optometrist discovers a condition which suggests the possibility of a pathology of the eye, the General Assembly has placed an affirmative duty on the optometrist to refer such a patient to a physician for medical treatment, further medical diagnosis or further refraction. Section 336.220.5. We believe the General Assembly's language regarding an optometrist's affirmative duty to refer certain patients, in Section 336.220, is merely a recognition of accepted optometric practice which exists without reference to the duty expressed in the statutes.

In our opinion, an examination of the eye by an optometrist using a diagnostic pharmaceutical agent must still be conducted consistent with Section 336.010 "to ascertain the presence of defects or abnormal conditions which can be corrected by the use of lenses, prisms, or ocular exercises." [Emphasis added.] The fact that the use of diagnostic pharmaceutical agents enhances the ability of an optometrist to determine the nature of a defect or abnormality does not change the practice of optometry. Thus, in our opinion, the certification by the board of an optometrist to employ diagnostic pharmaceutical agents is not required in order for an optometrist to examine a human eye to determine whether there is, in that eye, a condition or defect which is correctable with lenses, prisms or ocular exercises.

III.

ACCEPTANCE OF OPTOMETRIC DETECTION OF PROGRESSIVE
EYE DISEASE, MALFORMATION OR MALFUNCTION TO ALL
OR PART OF AN EYE, OR CENTRAL VISUAL ACUITY
WITHOUT CORRECTION OF 20/200 OR LESS IN ONE
EYE BY THE DEPARTMENT OF SOCIAL SERVICES

Your opinion request indicates a concern with the provisions of 13 CSR 40-91.030(1)(A) which bases eligibility for the Prevention of Blindness Program to certain findings made by an ophthalmologist or physician skilled in diseases of the eye. In our view, the regulation in question creates three separate criteria for eligibility to the Prevention of Blindness Program. A person who meets any one of the listed criteria, qualifies for the program. The criteria are: 1) "a progressive eye disease",

J. H. Frappier, Director

Central visual acuity without correction of 20/200 or less in one eye is unquestionably within the authority of an optometrist to determine.^{1/} The other two criteria for eligibility are not dependent on visual acuity. Given the educational requirements for licensure of an optometrist in Missouri,^{2/} we believe that the detection of the presence of progressive eye disease or malformation or malfunction of the eye is inherently within the authority of an optometrist, considering the nature of the optometric examination and accepted optometric practice of

1/

Under Section 336.030, RSMo Supp. 1983, no person may be licensed in Missouri to practice optometry unless that person has graduated from a school of optometry approved by the State Board of Optometry. By rule, the State Board of Optometry currently approves those colleges of optometry which are accredited by the Council on Optometric Education. See 4 CSR 210-2.020(2). The study of optometry is a four year professional program, and may be commenced only upon satisfaction of certain preliminary educational qualifications. In addition, prior to licensure as an optometrist in Missouri, the optometry graduate must pass the examination administered by the National Board of Examiners in Optometry. See 4 CSR 210-2.020(3). This examination tests an individual's knowledge in the following subjects: Theoretical Optics, Visual Science, Ocular Anatomy, Ophthalmic Optics, Theory and Practice of Optometry, Pathology, Public Health, and Pharmacology. The three-part test contains a total of 735 questions, to be answered in a total period of 20 hours. After passing the examination, an applicant for Missouri license to practice optometry must also pass the practical examination administered by the State Board of Optometry. Id.

2/

In the course of the preparation of this opinion, we reviewed the curricula of the Southern College of Optometry, Memphis, Tennessee, and the University of Missouri, St. Louis, School of Optometry. In order to obtain a Doctor of Optometry degree (O.D.), students in each of these institutions must successfully complete courses of study in, inter alia, Ocular or Ophthalmic Pathology and Systemic Pathology. As we noted in footnote 1, the licensing examination includes questions relating to Ocular Anatomy and Pathology.

J. H. Frappier, Director

referral of appropriate patients to medical doctors for final diagnosis and treatment of conditions of the eye not correctable by an optometrist.

Section 336.210 expresses the policy of the State of Missouri that state agencies may not practice discrimination against optometrists in favor of physicians and surgeons when "requiring or recommending services which legally may be performed by persons licensed [as optometrists]. . . ." The Bureau for the Blind, as a part of the Division of Family Services and the Department of Social Services, is a state agency to which Section 336.210 applies. Appendix B, Section 13, RSMo 1978; Section 207.010, RSMo 1978; Section 209.010, et seq., RSMo.

Because we believe that an optometrist may determine the existence of defects and abnormalities in the human eye pursuant to Section 336.010, and because the Bureau for the Blind is a state agency, we do not believe that the Bureau for the Blind may refuse to accept the results of optometric examinations to determine eligibility for benefits paid from state funds.^{3/}

3/

This view is further supported by reference to Section 209.040, RSMo. Supp. 1983. There the General Assembly provided:

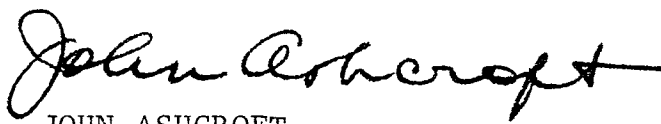
No person shall be entitled to receive a pension except upon a scientific vision test supported by a certificate of an ophthalmologist, a physician skilled in disease of the eye, or an optometrist, designated or approved by the department of social services to make such examination" [Emphasis added].

J. H. Frappier, Director

CONCLUSION

It is the opinion of this office that a licensed optometrist may in the course of examining the human eye, detect the existence of a pathological condition, defect, malfunction or malformation of the human eye. The Department of Social Services must accept the results of an optometric examination to determine a person's eligibility for benefits paid from state funds if the optometrist is authorized by law to perform the examination upon which eligibility is based.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

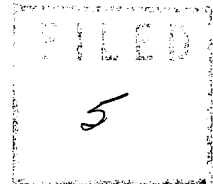
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 6, 1984

OPINION LETTER NO. 5-84

Mr. Larry Ferrell
Prosecuting Attorney
Cape Girardeau County
Courthouse Park
Cape Girardeau, Missouri 63701



Dear Mr. Ferrell:

This opinion is in response to your questions asking:

- a) If the County Court of a Second Class County has never determined that the business in charge of a public administration [sic] is such to reasonably require a separate office for the convenience of the public pursuant to R.S.Mo. 473.740 [sic], what are the obligations of the County, if any, to provide the public administrator reimbursement for ordinary expenses incurred in the course of handling the cases that the public administrator has, such as stationery and office material expense?
- b) One of the duties of the Public Administrator according to 473.743(8) is to take charge and custody of estates, or person and estate of all insane persons in his county, who have no legal guardian, and no one competent to take charge of such estate, or to act as such guardian can be found or is known to the Court having jurisdiction who will qualify.

Can the Judge of the Probate Division bypass the Public Administrator in the above case and appoint another person to take charge and custody of the estate who is not related to the incompetent nor

Mr. Larry Ferrell

familiar with the incompetent in anyway but who is otherwise qualified to be a guardian?

Section 473.737, RSMo 1978, states:

Each public administrator elected, as now or as hereafter provided for in sections 473.730 to 473.767, is hereby declared to be an officer for the county in which he is elected and for the city of St. Louis, if elected therein. The county courts of each county in this state shall make suitable provision for an office for the public administrator in the courthouse of the county if suitable space may be had for same, and shall be provided as soon as the county court shall be of the opinion that the business in charge of the public administrator is such as to reasonably require a separate office for the convenience of the public. The public administrator of the city of St. Louis shall have suitable and convenient offices provided for him the in civil courts building by said city. [Emphasis added.]

Section 49.510, RSMo 1978, states:

It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct. [Emphasis added.]

In Opinion No. 331, Burrell, 1964, this office reasoned that the special statute, Section 473.737, governs over the provisions of the general statute, Section 49.510, and that Section 473.737 must be read as an exception or qualification to Section 49.510. Accordingly, our 1964 opinion concluded that the county has no duty to furnish the public administrator an office if the county court is of the opinion that the workload is such that the public convenience would not be served by a separate office.

Mr. Larry Ferrell

Section 49.510, RSMo 1978, requires the county to equip the office of the officer. Given the fact that Section 473.737 creates an exception to Section 49.510, we do not believe Section 49.510 can be read to require the county court to equip an office which the county court has not determined is necessary.

We believe that your second question is properly addressed only in an appropriate judicial proceeding. We therefore decline to issue an opinion on your second question.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

April 23, 1984

DIRECT DIAL:

OPINION LETTER NO. 6-84

The Honorable James F. Antonio, CPA
State Auditor
P. O. Box 869
Jefferson City, Missouri 65101

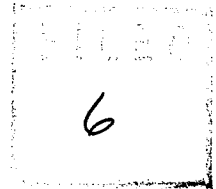
Dear Mr. Antonio:

This is in response to your question asking:

What is the legally authorized amount per month for the state to contribute to the Missouri State Highway Department And Missouri State Highway Patrol Medical And Life Insurance Plan on behalf of each employee?

Section 104.270, RSMo Supp. 1983, states:

The state highways and transportation commission may contribute toward a plan of hospital, surgical, medical and life insurance benefits the sum of twelve dollars per month for each employee who is a member of the state highways and transportation employees' and highway patrol retirement system. The highways and transportation commission may include coverage for members who have retired under the provisions of sections 104.010 to 104.270 in any plan for hospital, surgical and medical insurance benefits; provided such retired members are on June 14, 1977, covered under any group plan which provides such benefits for employees who are members of the highways and transportation employees' and highway patrol retirement system; and provided, further, that no contribution will be made by the commission or the state toward the cost of coverage for such retired members. The state highways and transportation commission may provide the insurance benefits



The Honorable James F. Antonio

authorized by this section by contract with insurance companies or, at its election, may provide for such coverage under section 104.515. If the state highways and transportation commission elects to contract with insurance companies or consultants concerning insurance benefits, such contract shall be open to public competitive bidding and review. Bidding shall be accomplished at intervals no greater than three years if the contract is to continue beyond contract period. The highways and transportation commission shall require the insurance carriers or consultants to keep and report all census data and premium-loss data normally required in competitive bidding and shall furnish same to all prospective bidders. [Emphasis added.]

This statute originated in 1977, H.B. 703, 1977 Missouri Laws 200, and was repealed and reenacted in 1983, H.B. 713, 1983 Missouri Legislative Service 1349, 1362 (Vernon's). The \$12.00 per employee-member per month contribution rate was not changed by the 1983 reenactment of this section.

Section 104.515.5, RSMo Supp. 1983, states:

The state shall contribute sixty-five dollars forty cents per month per employee who is a member of the Missouri state employees' retirement system, a member of the public school retirement system and who is employed by a state agency other than an institution of higher learning, the judicial retirement system, each legislator and official holding an elective state office, and if the state highways and transportation commission so elects, those employees who are members of the state highways and transportation employees' and highway patrol retirement system. This amount shall be reported as a separate item in the monthly certification of required contributions which the commissioner of administration submits to the state treasurer and shall be deposited to the separate account for hospital, surgical, medical, and life insurance benefits. All contributions made on behalf of members of the state highways and transportation employees' and highway

patrol retirement system shall be made from highway funds. The spouses and unemancipated children under twenty-three years of age of employees who are members of the Missouri state employees' retirement system, the judicial retirement system, of each legislator and official holding an elective state office and if the highways and transportation commission so elects, the spouses and unemancipated children under twenty-three years of age of employees who are members of the state highways and transportation employees' and highway patrol retirements [sic] system shall be able to participate in the program of insurance benefits to cover hospital, surgical, and medical expenses under ¹ the provisions of subsection 7 of this section. [Emphasis added.]

¹The current \$65.40 per employee-member per month elective contribution rate is established by Section 104.515.5 of S.B. 353, 1983 Missouri Legislative Service 418, 421 (Vernon's). But see Section 104.515.5 of H.B. No. 713, 1983 Missouri Legislative Service 1349, 1372-1373 (Vernon's) (stating a \$55.40 per employee-member per month elective contribution rate). Prior to the \$65.40 rate, the elective contribution rate was \$55.40 per employee-member per month. Section 104.515.5 of H.C.S.H.B. 1720, 1645, and 1276, 1982 Missouri Laws 271, 281. Prior to the \$55.40 rate, the elective contribution rate was \$35.65 per employee-member per month. Section 104.515.5 of H.C.S.H.B. 835, 53, 591, and 830, 1981 Missouri Laws 273, 293. Prior to the \$35.65 rate, the elective contribution rate was \$12.00 per employee-member per month. Section 104.515.5 of H.B. 129, 1979 Missouri Laws 295, 296.

Section 104.515.6 of H.B. 129, 1979 Missouri Laws 295, 296, stated in part:

In addition to the state contribution authorized under subsection 5 of this section, the state shall contribute the additional amounts required, as determined by the board, to fully fund hospital, surgical, medical and life insurance benefits for all employees as defined in section 104.310, the judicial retirement system, and each legislator and official holding an elective state office. If the state highway commission has

The Honorable James F. Antonio

Section 104.270, RSMo Supp. 1983, currently authorizes a contribution rate of \$12.00 per employee-member per month. Section 104.515.5, RSMo Supp. 1983, currently authorizes a contribution rate of \$65.40 per employee-member per month, if the State Highways and Transportation System elects to provide insurance benefits under Section 104.515, RSMo Supp. 1983.

footnote 1, continued

elected to provide insurance benefits as authorized by section 104.270, the state shall contribute, from highway funds only, the additional amounts required to fully fund hospital, surgical, medical and life insurance benefits for all employees who are members of the state highway employees' and highway patrol retirement system. The provisions of this subsection shall not apply, however, to those employees participating in any other program of hospital, surgical and medical benefits provided through, or as a result of, employment with a department, any other employer, or any plan established by the federal government. This additional amount of state contribution shall not exceed twenty-three dollars and sixty-five cents, and shall be reported in the monthly certification of contribution amounts which the commissioner of administration submits to the state treasurer and shall be deposited to the separate account for hospital, surgical, medical and life insurance benefits.
... [Emphasis added.]

This additional contribution rate provision was repealed by Section 1 of H.C.S.H.B. 835, 53, 591 and 830, 1981 Missouri Laws 271, 275.

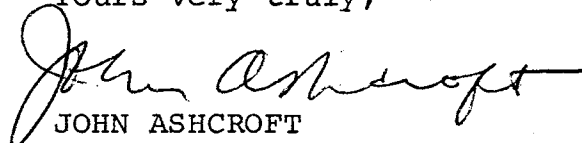
Prior to the \$12.00 per employee-member per month elective contribution rate and the additional contribution rate which had a ceiling of \$23.65, the elective contribution rate was \$12.00 per employee-member per month, and the additional contribution rate had a ceiling of \$11.65. Section 104.515.5 and .6 of S.B. 497, 1978 Missouri Laws 241, 244-245.

Prior to the effective date of S.B. 497, the elective contribution rate was \$12.00 per employee-member per month with no additional contribution rate. Section 104.515.5 of H.B. 703, 1977 Missouri Laws 200, 202. The elective contribution rate of \$12.00

The Honorable James F. Antonio

Accordingly, we conclude that the State Highways and Transportation Commission may contribute from highway funds at the rate of \$12.00 per employee-member per month toward a plan of hospital, surgical, medical and life insurance benefits under Section 104.270, RSMo Supp. 1983. If the State Highways and Transportation Commission elects to provide insurance benefits to members of the State Highways Employees' and Highway Patrol Retirement System under Section 104.515, RSMo Supp. 1983, the contribution rate is \$65.40 per employee-member per month, payable from highway funds.

Yours very truly,


JOHN ASHCROFT
Attorney General

Footnote 1, continued

for the State Highway Employees' and Highway Patrol Retirement System originated at Section 104.515.5 of S.B. 513, 1976 Missouri Laws 638, 641. Prior to S.B. 513, the State Highway Commission (now, State Highways and Transportation Commission) had no election to provide insurance benefits under Section 104.515, RSMo. See Section 104.515.5 of S.B. 548, 1972 Missouri Laws 629, 639.

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

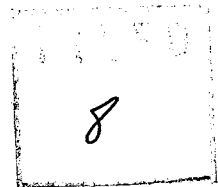
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

April 12, 1984

OPINION LETTER NO. 8-84

The Honorable John A. Birch
Representative, District 31
10106 Northwest 72nd Street
Weatherby Lake, Missouri 64152



Dear Representative Birch:

This opinion is in response to your question asking:

1. Does Opinion letter No. 99, dated March 17, 1981, apply to second class counties?
2. Section 137.560, RSMo 1978, provides that funds provided for in Section 137.555 (the one-fifth by the county from specials) shall be shown as a separate item on all of the financial, budget and other accounting statements of the county. Does depositing such funds in the county road district account and showing as a line item receipt source comply with this requirement?

We assume for purposes of this opinion that the exceptions for certain second class counties contained in Sections 137.554 and 137.556, RSMo 1978,^{1/} do not apply to your first question.

Opinion Letter No. 99, referred to in your first question, concluded that the special road and bridge tax, imposed by Section 137.555 and Article X, Section 12(a), Missouri Constitution, is to be paid into the special road and bridge fund in the county treasury, to be used for road and bridge purposes and no other purposes whatever. The statute also contains a provision regarding the portion of the road and bridge tax which is collected and paid

1/

All statutory references are to RSMo 1978, unless otherwise indicated.

The Honorable John A. Birch

upon any property lying and being within any special road district. Four-fifths of the money collected and paid upon this property is to be disbursed to the credit of the special road district from which it arose and is payable to such special road district upon warrants of the county court in favor of the commissioners or treasurer of such special road district; the other one-fifth of these funds is to be retained in the Special Road and Bridge Fund to be used, in the discretion of the county court, for improving or repairing any street in any incorporated city or village in the county, provided said street forms a part of a continuous highway of said county leading through such city or village.

In construing this statute, the 1981 opinion letter went on to conclude that the county court in such a case has no authority to give the one-fifth portion mentioned above to the special road district for use for either roads or bridges, because the General Assembly has provided for the exact use of the funds and has not authorized the county court to do otherwise with the remaining one-fifth portion.

Opinion No. 99 is consistent with the Dillon rule, as stated in Lancaster v. County of Atchison, 352 Mo. 1039, 180 S.W.2d 706, 708 (banc 1944) (quoting, Dillon on Municipal Corporations Section 89 (3d ed.)):

[C]ounties like other public corporations, "can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purpose of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."

Under the Dillon rule, before a second class county may give its funds to a special road district, a statute must exist that expressly or impliedly gives the county this power. (We do not believe the power to give funds to a road district is an essential or inherent power, absent any unusual circumstances.) The General Assembly has given counties the authority to grant their funds to certain fire protection districts and public library districts. Section 67.250. The General Assembly has given counties no such power to counties with regard to road districts. Cf. Sections 137.554 and 137.556 (authorizing second class counties to expend certain road and bridge taxes in certain cities, towns, and villages). In fact, Section 50.550 prohibits counties from

The Honorable John A. Birch

expending funds on bridges located in special road districts. Opinion No. 36, Parish, 1968. Accordingly, we conclude that second class counties may not grant to special road districts the one-fifth portion of road and bridge taxes derived from such special road districts for use on either roads or bridges.

The second question asked deals with Section 137.560, which states:

The funds provided for in section 137.555 shall be shown as a separate item on all of the financial, budget and other accounting statements of the county, and such fund shall be specifically and expressly shown and designated on all such as the special road and bridge fund of such county.

We assume for purposes of this opinion letter that the "county road district account" referred to in your second question is the Special Road and Bridge Fund referred to in Section 137.560. We conclude that the one-fifth portion of road and bridge taxes derived from special road districts does not have to be accounted for as a "line-item receipt source". Rather, Section 137.555 provides that all of the road and bridge tax money is to be deposited in the Special Road and Bridge Fund. The four-fifths portion of the road and bridge taxes derived from property lying in a special road district is then disbursed to the appropriate special road district, when supported by the proper documentation, e.g., a warrant, showing, inter alia, how the four-fifths portion is computed. Under the accounting method described above, the one-fifth portion of the road and bridge taxes derived from the property in a special road district is not accounted for separately as a line item receipt apart from the other moneys in the Special Road and Bridge Fund. This above-described accounting method complies with Sections 137.555 and 137.560 and does not account for the one-fifth portion as a line-item receipt.

Very truly yours,



JOHN ASHCROFT
Attorney General

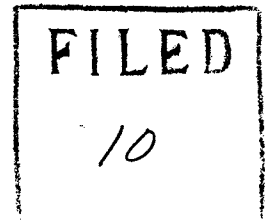
STATE EMPLOYEES' RETIREMENT SYSTEM:

Members of the Missouri State Employees' Retirement System who are retired and receiving benefits may be employed by a department, other than the General Assembly, on a part-time basis, i.e., less than fifteen hundred hours per year, and continue to receive retirement benefits.

April 27, 1984

OPINION NO. 10-84
(Amended)

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
Post Office Box 209
Jefferson City, Missouri 65101



Dear Ms. Hackwood:

This opinion is issued in response to your question asking:

Can a member of the Missouri State Employees' Retirement System, who is entitled to receive benefits or who is receiving benefits, be employed on a part-time basis, but less than 1500 hours and continue to receive MOSERS benefits while on work status?

If so, what effect does RSMo 104.380 have?

What effect does RSMo 104.380(2) [sic] have and more specifically, does it prohibit the employment?

We assume for purposes of this opinion that the employment referred to in your question is employment with a "department", as that word is defined in Section 104.310(15), RSMo Supp. 1983.^{1/} The employed person is a retired member of the Missouri

^{1/}

All statutory references are to RSMo Supp. 1983, unless otherwise indicated.

Mary-Jean Hackwood

State Employees' Retirement System, but is not an "employee", as that word is defined in Section 104.310(20)(a), because the employed person is working less than 1500 hours per year.^{2/}

Section 104.310(20)(a) defines the term "employee", in pertinent part, as:

Any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is currently accumulating benefits under some other retirement or benefit fund to which the state is a contributor; . . .^{3/}

Section 104.380.2 provides:

If a retired member is elected to any state office or is appointed to any state office or is reemployed by a department, the member shall not receive an annuity for any month or part of a month for which the member serves as an officer or employee, but the member shall be considered to be a new employee with no previous creditable service and must accrue creditable service of two or more years after reemployment in order to receive any additional annuity. Any reemployed retired member who has two or more years of creditable service after reemployment and later retires shall receive an additional amount of monthly annuity calculated to include only the creditable service and the average compensation earned by the member

2/

The definition of "employee" at Section 104.310(20)(b) includes certain legislative employees who need not work 1500 hours per year. We assume that such legislative employees are not involved here.

3/

Section 104.310(21)(a) of House Bill No. 1370 of the Second Session of the Eighty-Second General Assembly, effective October 1, 1984, reduces the hourly requirement to 1000 hours. See also Section 104.310(21)(b) with respect to legislative employees.

Mary-Jean Hackwood

since reemployment. In either event, the original annuity and the additional annuity, if any, shall be paid commencing with the end of the first month after the month during which the member's term of office has been completed, or the member's employment terminated.^{4/}

Section 104.380.2 refers to a retired member who is reemployed by a department, and who is an "employee". This statute allows such employee to receive an additional annuity after accruing two or more years of creditable service after reemployment and then retiring. As we have noted, however, a person who is employed less than fifteen hundred hours is not by definition an "employee". It follows, in our view, that the prohibition of Section 104.380.2 respecting the receipt of an annuity "for any month or part of a month for which the member serves as an . . . employee" is not applicable to nonlegislative part-time employees.

CONCLUSION

It is the opinion of this office that members of the Missouri State Employees Retirement System who are retired and receiving benefits may be reemployed by a department, other than the General Assembly, on a part-time basis, i.e., less than fifteen hundred hours per year, and continue to receive retirement benefits.

Very truly yours,



JOHN ASHCROFT
Attorney General

^{4/}

Section 104.380.2 of House Bill No. 1370 of the Second Session of the Eighty-Second General Assembly, effective October 1, 1984, reduces the period of creditable service required to qualify for the additional annuity from two years to one year.

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

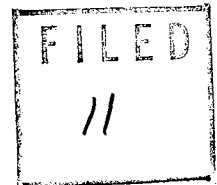
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

April 12, 1984

OPINION LETTER NO. 11-84

The Honorable John D. Wiggins
Phelps County Prosecuting Attorney
Phelps County Courthouse
Rolla, Missouri 65401



Dear Mr. Wiggins:

This opinion is in response to your request for an opinion on the following questions:

1. In a county of the third class with a pathologist serving as coroner, does Section 58.580, RSMo 1978 [sic], prohibit the payment by the county to said pathologist of just and reasonable compensation for his services rendered as a pathologist in a post mortem medical examination?
2. Does the term "post mortem examination" as used in Chapter 58, RSMo 1978, as amended, with respect to coroners in counties of the third class, apply only to those actions that may be performed by anyone serving as coroner or does the term include those actions which may only be conducted by a duly licensed individual, such as a pathologist, if the coroner is a pathologist?
3. Are the results of a post mortem medical examination, whether in written or oral form, conducted by a hospital pathologist for the coroner of a county of the third class and delivered to said coroner, public records within the meaning of Chapter 610, RSMo 1978, as amended?

The Honorable John D. Wiggins

4. Can a county of the third class require the person requesting a copy of the post mortem medical examination conducted by a pathologist for the coroner, said post mortem medical examination being paid for by the county, to pay the cost of said post mortem medical examination prior to receiving a copy of the report?

5. As to questions 3 and 4, is the same result reached if the coroner and pathologist are the same person?

I.

1. In a county of the third class with a pathologist serving as coroner, does Section 58.580, RSMo 1978 [sic], prohibit the payment by the county to said pathologist of just and reasonable compensation for his services rendered as a pathologist in a post mortem medical examination?

Section 58.530, RSMo 1978,^{1/} states:

Whenever the coroner, being himself a physician or surgeon, shall conduct a post-mortem examination of the dead body of a person who came to his death by violence or casualty, and it shall appear to the county court that such examination was necessary to ascertain the cause of such person's death, the county court may allow the coroner therefor an additional fee, not exceeding twenty-five dollars, to be paid as his other fees in views and inquests; but section 58.560 shall not be construed to apply to any such examination when made by the coroner himself.
[Emphasis added.]

^{1/}

All statutory references are to RSMo 1978, unless otherwise indicated.

The Honorable John D. Wiggins

Section 58.560 states:

When a physician, surgeon or pathologist shall be called on by the coroner, or any magistrate of the county acting as the coroner, to conduct a postmortem examination, the county court of said county shall be authorized to allow such physician, surgeon, or pathologist to be paid out of the county treasury, such fees or compensation as shall be deemed by said court to be just and reasonable.

We view your first question to be whether a third class county coroner who is also a pathologist is entitled to the surgeon's fee authorized by Section 58.560. We conclude that third class county coroners who are also pathologists may not collect fees under Section 58.560.

In Opinion No. 101, Bruce, 1967, copy enclosed, this office concluded that fourth class county coroners are not entitled to the twenty-five dollar (\$25.00) fee provided for in Section 58.530, RSMo 1959 (now, RSMo 1978). Relying on Opinion No. 89, Thurman, 1953, copy enclosed, the 1967 opinion concludes that the purpose behind the enactment of Section 2 of H.B. 880, 1945 Mo. Laws 992, and Section 2 of H.B. 881, 1945 Mo. Laws 1551, (both of which are presently codified at Section 58.100), was to put coroners on a salary-based compensation. See, e.g., Sections 58.110, RSMo 1978, and 58.135, RSMo Supp. 1983. This reasoning has been used in other opinions of this office. See, e.g., Opinion, Mayse, March 17, 1950. Because the compensation of coroners is to be entirely salary-based, a coroner-pathologist may not collect fees under Section 58.560.

II.

2. Does the term "post mortem" examination as used in Chapter 58, RSMo 1978, as amended, with respect to coroners in counties of the third class, apply only to those actions that may be performed by anyone serving as coroner or does the term include those actions which may only be conducted by a duly licensed individual, such as a pathologist, if the coroner is a pathologist?

The phrase "post mortem examination" appears in Chapter 58 in Sections 58.530 and 58.560. These sections concern only the payment of fees to physicians, surgeons, or pathologists who

The Honorable John D. Wiggins

themselves (as the coroner) or at the request of the county coroner, perform a post-mortem examination. Thus, in our opinion, the fees payable for the performance of a post-mortem examination are payable only to physicians, surgeons, or pathologists. We note, for your information, that in Opinion Letter No. 591, Brandom, 1970, copy enclosed, this office concluded that a coroner-physician is not required to conduct the post-mortem examination himself and may call upon a pathologist, surgeon, or physician to conduct the examination.

III.

3. Are the results of a post mortem medical examination, whether in written or oral form, conducted by a hospital pathologist for the coroner of a county of the third class and delivered to said coroner, public records within the meaning of Chapter 610, RSMo 1978, as amended?^{2/}

Section 610.015 states in part: "Except as provided in section 610.025, and except as otherwise provided by law, . . . public records shall be open to the public for inspection and duplication." Section 610.010(4), RSMo Supp. 1983, defines the words "public record" in relevant part as: "[A]ny [1] record [2] retained by or of [3] any public governmental body, . . . ;".

The first part of this definition is that the item to be examined must be a record. Although the Sunshine Law does not contain any definition of the word "record", the State and Local Records Law contains the following definition of the word "record" at Section 109.210(5):

[D]ocument, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business. . . .
[Emphasis added.]

^{2/}

In addition to the Sunshine Law, Chapter 610, RSMo 1978 and Supp. 1983, public access to public records is recognized by Sections 109.180 and 109.190, RSMo 1978, and Missouri common law, e.g., Disabled Police Veterans Club v. Long, 279 S.W.2d 220 (Mo. App. 1955). We will not analyze these rights of access, because the question asked deals only with the Sunshine Law.

The Honorable John D. Wiggins

Construing the definition of the word "record" in the State and Local Records Law in pari materia with the word "record" in the Sunshine Law, we find that oral presentations of the results of post-mortem medical examinations are covered by Section 610.015 and are not records. Sound recordings of oral presentations are records, in our opinion, as are the written results of such examinations.

The second part of the Section 610.010(4) definition is that the records must be retained by or of a public governmental body. Because the records in question were delivered to the coroner, these records are either retained by the coroner or are the property of the county. See Section 109.270.

The third part of the definition is that the records must be retained by or of a public governmental body. Section 610.010(2), RSMo Supp. 1983, defines the words "public governmental body" in relevant part as:

[A]ny legislative or administrative governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, or by executive order, including any body, agency, board, bureau, council, commission, committee, department, or division of the state, of any political subdivision of the state, of any county or of any municipal governmental, school district or special purpose district, any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rule-making or quasi-judicial power, . . . ;".

In Opinion Letter No. 48, Cox, 1979, copy enclosed, this office concluded that the coroner's jury constituted a "public governmental body" for purposes of Section 610.010, RSMo 1978. (now, RSMo Supp. 1983).

This means that coroners' records are "public records" for purposes of the Sunshine Law, and that a public right of access exists with regard to them, "[e]xcept as provided in Section 610.025, and except as otherwise provided by law, . . .". Section 610.015. Our 1979 opinion letter concluded that the exceptions specified in Section 610.025, RSMo 1978 (now, RSMo Supp. 1983), including the "litigation exemption", are not applicable to coroners' records. We also found that the only confidentiality

The Honorable John D. Wiggins

law which "otherwise provided by law" was Section 58.449, RSMo 1978 (now, RSMo Supp. 1983), which makes certain blood alcohol and drug content reports confidential.

Since the time of our 1979 opinion letter, however, the courts have begun to expand the "otherwise provided by law" category of records by implying exceptions to the Sunshine Law. In Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. App. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1233 (1983), the court concluded that the part of police records containing the name and address of a victim were closed records. One of the rationales behind implying the closure of victim-name-and-address information was that disclosure of such information would infringe the victim's "right of privacy". The court implied that the victim in Hyde might have maintained an action for invasion of privacy, and because this tort action existed for disclosure of the victim-name-and-address information, this information was closed as "otherwise provided by law."

It is the rule in Missouri that a widow or other close family member has a quasi property right in the remains of his or her husband or relative, entitling him or her to the possession and control of the decedent's remains for the purpose of preparing and interring the body properly. Patrick v. Employers Mut. Liability Ins. Co., 137 Mo. App. 332, 118 S.W.2d 116 (1938). Although no Missouri case holds that the right of control over the body includes the right to control information regarding the body, we can imagine factual situations where the disclosure of embarrassing facts regarding the condition of a dead body could possibly give rise to a tort claim by the widow or other close family member of the decedent.

Accordingly, we conclude that coroner's records are subject to public inspection and duplication, except such records as are confidential under Section 58.449, RSMo Supp. 1983, and that part of such records containing facts regarding the condition of the decedent's body, the disclosure of which would cause severe mental anguish to the decedent's immediate family or constitute an invasion of the right of privacy of the decedent's family.

IV.

4. Can a county of the third class require the person requesting a copy of the post mortem medical examination conducted by a pathologist for the coroner, said post mortem medical examination being paid for by the county, to pay the cost of said post mortem medical examination prior to receiving a copy of the report?

We assume that your question deals only with post-mortem examinations conducted upon a reasonable belief that a person met his death by violence or casualty. Generally, the county is liable for the costs of the coroner's inquest. See Section 58.570; Houts v. Prussing's Admlr, 102 Mo. 13, 14 S.W. 766 (1890). But see Sections 58.580 and 58.590. As we understand your question, you seek to allow the county to charge any person who wishes a copy of an autopsy report, the full cost of the post-mortem examination. We find no provision of law allowing the county to be reimbursed by persons requesting copies of an autopsy report for costs it has incurred in performing the post-mortem examination. Therefore, we answer your question in the negative.

V.

5. As to questions 3 and 4, is the same result reached if the coroner and pathologist are the same person?

The result reached in resolving questions 3 and 4 is the same if the coroner and pathologist are the same person.

CONCLUSION

It is the opinion of this office that:

(1) A third class county coroner who is also a pathologist is not entitled to the fee provided for in Section 58.560, RSMo 1978.

(2) The post-mortem medical examination referred to in Sections 58.530 and 58.560, RSMo 1978, is that which is performed by a physician, surgeon, or pathologist.

The Honorable John D. Wiggins

(3) Coroners' records are subject to public inspection and duplication under the Sunshine Law, except such records as are confidential under Section 58.449, RSMo Supp. 1983, and that part of such records containing embarrassing facts regarding the condition of the decedent's body, the disclosure of which would cause severe mental anguish to the decedent's immediate family.

(4) A person requesting a copy of a post-mortem medical examination report is not required to reimburse the county for the cost of the post-mortem medical examination.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft".

JOHN ASHCROFT
Attorney General

Enclosures: Opinion No. 101, Bruce, 1967
Opinion No. 89, Thurman, 1953
Opinion Letter No. 591, Brandon, 1970
Opinion Letter No. 48, Cox, 1979

Attorney General of Missouri

JEFFERSON CITY

65102

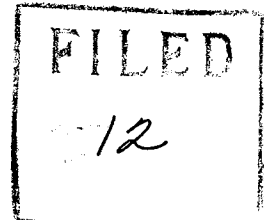
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

May 21, 1984

OPINION LETTER NO. 12-84

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
Truman Office Building
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This is in response to your request for an opinion as follows:

May a public school district contract with a private non-sectarian institution for the provision of educational services to students formally enrolled in a school of the district but assigned to the private institution for attendance and classes including those that may lead toward a high school diploma? May the district further include the membership and attendance of such students as a part of its application for state aid funds?

In addition, you inform us that certain private, non-sectarian schools and agencies wish to serve students in certain school districts who have been enrolled in the school districts but who have not been diagnosed as needing special education services. You inform us that "in many cases these students have been unable to adapt and function effectively in the public schools but may be successful in the alternative programs provided by [the private, non-sectarian schools]. . . ."

It is our understanding that your question does not involve a sectarian institution. Therefore, the well-known state constitutional prohibitions against state support for sectarian institutions will not be discussed in this opinion, as it is clear that no contract with a sectarian institution for provision of educational services could be entered into by any school district.

Dr. Arthur L. Mallory

From your question and the facts you supplied with it, it is apparent that the students who would be served under the proposal in question are those who are entitled to a free, public education and gratuitous instruction pursuant to Article IX, Section 1(a), Missouri Constitution. The right conferred by the Constitution is only to attend a public school in the district of the student's residence. State ex rel. Biggs v. Penter, 96 Mo. App. 416, 70 S.W. 375 (1902). There is no right conferred by the Constitution to attend a private school at public expense.

At the heart of your request is a basic determination of the powers of public school districts to provide for the education of persons who reside within the district. In so doing, we are reminded that:

Our courts have frequently announced and heartily approved the salutary and time-honored principle that school laws will be construed liberally to aid in effectuating their beneficent purpose, and that, since the administration of school matters usually rests in the hands of plain, honest and well-meaning citizens, not learned in the law, substantial rather than technical compliance with statutory provisions and requirements will suffice. . . . State v. Robinson, 276 S.W.2d 235, 240 (Mo. App. 1955).

See also England v. Eckley, 330 S.W.2d 738 (Mo. banc 1959), and Naugher v. Mallory, 631 S.W.2d 370 (Mo. App. 1982). Thus, our courts recognize that the legislature has given to school boards power to exercise judgment in matters affecting school management and are not want to interfere with the board's exercise of its discretion unless the board has exercised its power in an unreasonable, arbitrary, capricious or unlawful manner. Meloy v. Reorganized School District R-1 of Reynolds County, 631 S.W.2d 933 (Mo. App. 1982).

Section 432.070, RSMo 1978, provides as follows "[n]o . . . school district shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law," Other than this general statutory authorization for a school district to contract, we have found no cases or statutes which discuss the ability of a school district to contract with a non-sectarian institution for the provision of educational services for nonhandicapped children whose educational needs are not being met by the school district itself. Therefore, in order to answer your question, we must determine whether or not the arrangement you describe is within the powers of a school district to enter.

Dr. Arthur L. Mallory

School districts in Missouri are organized to discharge the constitutional mandate of educating our youth "that the rights and liberties of the people be preserved." School Dist. of Oakland v. School Dist. of Joplin, 102 S.W.2d 909 (Mo. 1937). As regards the powers of school districts in this state, the courts have stated that the board of directors of a school district can exercise only such authority as is either expressly conferred or arises by necessary implication from the powers that are conferred. See, Cape Girardeau School District No. 63 v. Frye, 225 S.W.2d 484 (Mo. App. 1949); Wright v. Board of Education of St. Louis, 246 S.W.43 (Mo. 1922).

We believe the question you present is a close one. Yet, the facts you present are compelling. As we understand them, students who have dropped out of school or who are unable to be educated in the public schools because of discipline problems, etc., are accepted by a private, non-sectarian institution for educational purposes. The student is not required to pay tuition to attend the private school. These institutions have demonstrated substantial success in providing educational services to these students. It is our understanding that, but for the intervention of the private, non-sectarian institutions, the formal educational process for these troubled youngsters would cease.

As we noted earlier, school laws are to be liberally construed to "aid in effectuating their beneficent purpose" Robinson, supra. Given the facts you describe, in our view, the courts would approve the arrangement you describe. Thus, we believe that the beneficent purpose of our school laws, expressed most broadly in Article IX, Section 1(a), is served by the arrangement you describe when viewed in this specific factual context. We stress, however, that it is the school district's responsibility to attempt to provide services themselves. School districts may not delegate this responsibility by purchasing programs from a private institution absent circumstances that would justify utilizing school funds in this manner. A controlling factor would be, in our opinion, that a school would not have the resources to develop a program itself and by contracting for the service the district would be meeting its obligation to provide these students with an education while preserving the financial resources of the district.

The children discussed in your opinion request are those who have elected to attend a public school. Of course, a school district may not contract to do what it may not do itself, such as employ noncertificated teachers or establish classrooms in another state. Any public school district or non-sectarian institution which would be providing services under a contract such as you describe must be located within the State of Missouri and meet the same standards for the program purchased as the contracting

Dr. Arthur L. Mallory

district must for approval from the State Board of Education to meet its obligation under state law. It is obvious also that for credit to be applied to graduation requirements for these students, classes offered must meet applicable State Board of Education criteria.

In balancing the public policy of providing education to the children of this state and the duties of various public school boards to manage school districts, with the facts you present, we believe that a school district board of directors may enter an arrangement such as you describe which ultimately results in education being provided at no cost to youngsters for whom other educational avenues are foreclosed.

You have also asked if these students may be included in the membership and attendance of the contracting school district for purposes of state aid. If the students are provided with educational services through a public school which meets the same criteria and requirements that the State Board of Education has set for the school district to provide for students attending the district's schools, these students may be included by the district in its application for state aid funds. Of course, no more state aid would be paid to the district than it would receive if the child attended classes in a school district's building.

We add the following caveat:

In order to carry out its responsibility over the educational process for the youngsters described in your request, we believe the district should be required to retain ultimate authority over the content and form of the educational services which are provided by the private non-sectarian school. The district should establish procedures, including the retention of the right to monitor performance under the contract, which will allow the district to assess the effectiveness of the educational services provided these exceptional youngsters. We believe that the contract entered between the district and the private, non-sectarian institution should contain language which will assure the district board of directors of their ability to retain such authority and control.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

EDUCATION:
EDUCATION OF HANDICAPPED ACT:
EDUCATIONAL PROGRAMS:
MENTAL HEALTH:
MENTALLY DISTURBED CHILDREN:
MENTALLY HANDICAPPED PUPILS:
MENTAL ILLNESS:
MENTAL RETARDATION:
SCHOOL DISTRICTS:
SCHOOL CONTRACTS:
SCHOOLS FOR SEVERELY HANDICAPPED
CHILDREN:

Missouri law requires the Department of Mental Health to provide special educational services to school-aged, inpatient children who reside outside the school district of their domicile and whose condition renders them unable to leave the Department of Mental Health facility to which they are assigned. The Department of Elementary and Secondary Education has the authority to

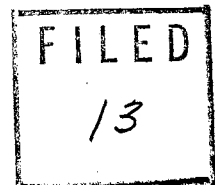
monitor the provision of educational services by the Department of Mental Health, for compliance with the Education of the Handicapped Act. The Department of Mental Health is required to provide a "due process" hearing either prior to or following the discharge of a school-age child when the Department of Mental Health acts as the educational provider. If the Department of Mental Health is not acting as the educational provider, the local school district or the Department of Elementary and Secondary Education, must provide such due process hearing. The Department of Mental Health need not continue treatment or care of school-age children discharged by the Department of Mental Health pending an "educational discharge" hearing. Section 162.970.4, RSMo, requires the Department of Mental Health to pay the serving district the amount by which the per pupil cost of special educational services exceeds the amount received from the domiciliary district and other state monies for severely handicapped school-age children in facilities or programs of the Department of Mental Health when the child is educated by the local district under Section 162.970.1, supra.

July 20, 1984

OPINION NO. 13-84

Paul R. Ahr, Ph.D., M.P.A.
Director
Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary
and Secondary Education
515 East High Street
Jefferson City, Missouri 65101



Dear Drs. Ahr and Mallory:

This is in response to your joint request for an opinion in which you pose nine questions relating to the education of school-aged children in facilities and programs of the Department of Mental Health (hereafter "DMH"). This opinion request is born of a disagreement between DMH, the Department of Elementary and Secondary Education (hereafter "DESE") and local school districts, as to which agency bears the responsibility for educating children placed in DMH facilities as a result of a need for services which DMH provides. State law is not a model of clarity as it addresses the appropriate assignment of such responsibility. The difficulties presented by state law are compounded by federal laws (which we discuss below) which arbitrarily restrict the options of DMH and DESE and which, in practical application, impede these state agencies in their attempt to serve their clients and achieve the goals for which they were created.

We have no control over the federal government; we can only lament its careless disregard for what we believe are the best interests of Missouri's mentally ill and mentally handicapped children. We do suggest, however, that our General Assembly carefully study and consider appropriate legislation to clarify the important relationship between DMH and DESE which your questions call into focus.

Because of our answer to question number one, we believe that answers to only five of your questions need be given. However, before these questions may be answered, a review of applicable state and federal law is necessary to establish the constitutional and statutory basis from which these answers flow.

Article IX, Section 1(a), provides:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

Article IX, Section 2(a) creates a state board of education and vests in it "[t]he supervision of instruction in the public schools. . . ."

Article IV, section 37(a) provides that the Department of Mental Health "shall provide treatment, care, education and training for persons suffering from mental illness or retardation, shall have administrative control of the state hospitals and other institutions and centers established for these purposes and shall administer such other programs as provided by law."

These three constitutional provisions seem to create duplicative responsibilities in the public school system and DMH for the provision of education for children who reside in DMH institutions. On the one hand, the DESE bears responsibility for the supervision of efforts to carry out the general constitutional mandate of Article IX, Section 1(a); on the other hand, the constitution places an affirmative duty on DMH to provide education for all persons suffering mental illness or mental retardation.^{1/}

Under the directive of Article IX, Section 1(a), supra, the Missouri legislature has established a system of free public schools which is organized into local school districts. The right granted by the Constitution in Article IX, Section 1(a) extends only a right to attend a public school in the district of the child's domicile. State ex rel. Biggs v. Penter, 96 Mo. App. 416, 70 S.W. 375 (1902); State ex rel. Roberts v. Wilson, 221 Mo. App. 9, 297 S.W. 419 (1927). When a child is placed outside his school district of domicile by a state agency or court, legislation and the constitution provide for an alternative source of gratuitous education. Pursuant to Section 162.970 RSMo 1978, such handicapped children may be placed outside their domiciliary

^{1/} In interpreting Article IV, Section 37(a), supra, and the statutory implementations of the constitution, we may consider legislative interpretations. In re V., 306 S.W.2d 461 (Mo. banc 1957); State ex rel. Randolph County v. Walden, 206 S.W.2d 979 (Mo. banc 1948). We may also consider the state of the law at the time of the adoption of Senate Committee Substitute for House Joint Resolution No. 65 by the people as part of our constitution (which added Article IV, Section 37(a), to the constitution) in 1972. Prior to the adoption of Section 37(a) by the people, the Department of Mental Health existed only as a division of another department of state government. We find no legislative history which explains the development of HJR 65. However, we note that at the time HJR 65 was adopted by the legislature, the statutory enactments relating to mental health directed the Division to provide "treatment, examination and report, education and training of persons suffering from mental illness or mental retardation, . . ." Section 202.020, RSMo 1969.

In 1973, the year after the constitution was amended by Article IV, Section 37(a), the state legislature amended Chapter 202 to establish the regional center method for entry into, and exit from, services provided to the mentally retarded and extended those services to a newly defined class called the "developmentally disabled." In that 1973 amendment, "(6) training and education" was listed among twelve categories of services which a DMH regional center was authorized to provide to its clients.

Finally, we note that the General Assembly has provided appropriations to DMH to fund some educational efforts for handicapped inpatients since 1973.

district by courts of competent jurisdiction, the Department of Social Services or DMH.

When a child is placed outside his domiciliary district, the domiciliary district no longer can provide the education guaranteed by the constitution directly. Thus, a determination of which agency of the state assumes the educational responsibility must be made.

Chapter 162, RSMo, creates a comprehensive system of responsibility for the provision of education to school-aged children residing in the state. Sections 162.670 to 162.995 RSMo, directly address the provision of educational services to handicapped and severely handicapped children. Section 162.670 RSMo 1978, states the purpose of the Special Educational Services Law (Section 162.670 et seq.) as follows:

In order to fully implement section 1(a) of article IX, . . . it is hereby declared the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein, as an integral part of Missouri's system of gratuitous education, special educational services sufficient to meet the needs and maximize the capabilities of handicapped and severely handicapped children. The need of such children for early recognition, diagnosis and intensive educational services leading to a more successful participation in home, employment and community life is recognized. .
..2/

2/ Section 630.020.1(2) RSMo Supp. 1983, contains a similar charge to DMH:

The department shall seek to do the following for the citizens of this state:

* * *

(2) Maintain and enhance intellectual, interpersonal and functional skills of individuals affected by mental disorders, developmental disabilities or alcohol or drug abuse by operating, funding and licensing modern treatment and habilitation programs provided in the least restrictive environment possible;

We believe the language of Section 630.020 is the functional equivalent of the language of Section 162.670, as it describes the role of DMH in the lives of handicapped or severely handicapped

Section 162.680 RSMo 1978, provides for the education of handicapped and severely handicapped children "[t]o the maximum extent practicable. . . along with children who do not have handicaps. . . ."

Section 162.685 RSMo 1978, requires the state board of education to establish standards for special education programs in Missouri. Section 162.705 RSMo 1978, allows local school districts or special districts which are unable to provide special educational services to handicapped or severely handicapped children to contract with nearby districts or, if no suitable program is available, with nonprofit organizations to provide such special education. The state board of education may provide special educational services by contract, if a local district fails to provide special educational services. Funding for the contractual provision of special educational services is the responsibility of the district of residence of the handicapped child.

Some children who come within the definition of "handicapped" contained in Section 162.610, RSMo 1978, are patients in DMH facilities. When such a placement occurs, the school district of domicile of the child pays toward the cost of the education of that child an amount equal to the local tax effort regardless of whether the child is educated in a DMH facility or by the local school district. Section 162.740 RSMo Supp. 1983.

We note that the General Assembly has required payment by the parents' district of residence for a child attending "an educational program for a full-time patient or resident at a facility operated by the department of mental health. . . ." Section 162.740. In addition, Section 162.745 RSMo Supp. 1983 requires DMH to "determine the amount due from each school district under section 162.740. . . ." The school district of residence must remit "to . . . the department of mental health, from either teacher or incidental funds of the district, the amount due the state. . . . [T]he department of mental health shall deposit the moneys with the state treasurer." Id.^{3/}

(footnote continued from previous page)
children entrusted to DMH's care. The development of the intellect is a function of education. Enhanced interpersonal skills allow for more successful participation in home and community life. Functional skills are those which allow a handicapped person to obtain and keep employment.

^{3/} In Attorney General Opinion No. 80, dated October 19, 1976, this office opined regarding the method the Department of Mental Health should utilize in collecting the local tax effort for each handicapped child placed in its facilities when a dispute with the local school district arose.

Section 162.970.1, RSMo 1978, provides that children in two categories -- those who are admitted to programs or facilities of the Department of Mental Health and those who reside in a school district other than their district of domicile as a result of placement by a court or the Departments of Social Services or Mental Health,

[S]hall have a right to be provided the services described by sections 162.670 to 162.995 and shall not be denied admission to any appropriate regular public school or special school district program or program operated by the state board of education, as the case may be, where the child actually resides because of such admission or placement; provided, however, that nothing in sections 162.670 to 162.995 shall prevent the department of mental health, the department of social services or a court of competent jurisdiction from otherwise providing or procuring such special educational services for such child. [emphasis added]

We believe that Section 162.970.1 guarantees to children in state placement, who are not residing in their parents district of domicile, the right to attend and be served by the public school or special school district where the child actually resides. This is a natural statutory extension of the child's constitutional right to attend the schools in which he or she is domiciled. But we believe this statutory right is tempered by Art. IV Section 37(a) with regard to children whose handicap makes them a danger to themselves or others if not under constant supervision, who are, therefore, unable to leave the institution, and thus, are not appropriate candidates for off-facility education. These children are not constitutionally entitled to an education by the local district since they do not reside in their domiciliary district, and cannot exercise their statutory right to admission to regular public school or special school district programs. They are, however, constitutionally entitled to an education, to be provided by DMH, by virtue of Art. IV, Section 37(a). Chapter 162 clearly contemplates that DMH will, in some instances, be an educational provider. See e.g. Section 162.745, supra.

With these general concepts of responsibility in mind, we turn to a review of federal law which impacts upon the answers to your questions. The Education of the Handicapped Act (hereinafter "EHA" or the "Act") places an affirmative responsibility upon states accepting federal funding under the Act to provide a free appropriate public education to children who come within the Act's definition of "handicapped child" set forth in 20 U.S.C. Section 1401(a)(1). See 20 U.S.C. Section 1412(1).

The Act requires, as a precondition to receipt of federal funds, that a state or centralized educational agency prepare and submit a state plan of compliance guaranteeing the provision of educational services and procedural safeguards, 20 U.S.C. Section 1413(a). The state educational agency must approve all applications for federal funding tendered by educational agencies, or institutions providing public education, which comply with the Act, 20 U.S.C. Section 1414(b). In Missouri, the State Board of Education, through DESE, has the authority, and "ultimate responsibility for compliance with . . . [the Act's] statutory mandate" Yaris v. Special School District of St. Louis County, 558 F. Supp. 545, 560 (E.D., Mo. 1983), aff'd on appeal ___ F.2d ___ (8th Cir. 1984); 20 U.S.C. Section 1412(6); 34 C.F.R. 300.134.

We turn now to the questions you have posed. Throughout this opinion we assume that the educationally handicapped children to which we refer are persons who cannot leave the campus of a DMH facility, by DMH's own determination, to receive their education.

I.

You first inquire as follows:

What is the responsibility and authority of the Department of Mental Health under applicable state and federal law with regard to admitting and discharging school-aged children into or from state mental health facilities or Department of Mental Health placement?

Admission to and discharge from the facilities of the Department of Mental Health for those suffering from mental illness or mental disorder are controlled by Sections 632.110 through 632.175, and for those persons affected by mental retardation or developmental disabilities, by Section 633.110 through 633.130. Both Chapters 632 and 633 provide that admission to state facilities occurs only on the basis of qualifying diagnoses and the need for inpatient treatment. Perhaps more importantly, both chapters provide that a review of each patient's condition occur at least every one hundred eighty days, and should the patient's condition no longer require mental health inpatient care, that person is to be discharged from the facility. Sections 632.175; 633.125; 633.130.

The Omnibus Mental Health Act of 1980, contained in Chapters 630 through 633 RSMo clearly contemplates that admission and discharge of school-aged children into and out of facilities and programs of the Department of Mental Health will be accomplished based upon the need of the child for psychiatric treatment or rehabilitative mental retardation services. In our review of the statutes pertaining to mental health we find nothing to indicate

that the legislature intended that educational considerations would play a part in admission and discharge decisions for school-aged children. To the contrary, the direction contained in the statutes appears to exclude non-service related needs as reasons to retain patients in state mental health facilities or programs.

As a general rule, Chapter 162 assigns responsibility for the provision of special educational services to handicapped children to the school district in which the child is placed or, in default of the local school district providing special educational service, to the Department of Elementary and Secondary Education. We believe Section 162.970.1, read together with Article IV, Section 37(a), provides an exception to the general rule by requiring DMH to provide special educational services for handicapped or severely handicapped children who are placed out of their domiciliary district and whose handicap makes it impossible for them to leave the campus of the DMH facility to which they are assigned. When the Department of Mental Health is the educational provider because of the nature of the child's handicap, DMH must comply with EHA and the regulations promulgated pursuant to EHA.

Thus, with respect to the discharge of a patient who is school-aged, DMH must make provisions to retain a child in its special education program while required federal and state notice and due process rights are provided, unless it can be shown that the child's continued stay in a DMH facility is harmful or detrimental to his or her welfare. In particular, we note 34 C.F.R. 300.504(a) which requires reasonable written notice prior to any action to change the educational placement, and 34 C.F.R. 300.512 requiring that the child be held in his or her current placement pending the outcome of due process hearings. The Department of Mental Health is bound to comply with the EHA if it is providing related services or is involved in the education of handicapped children. 34 C.F.R. 300.2.

Under federal law and state statute a child's educational placement may not be changed without prior parental consent or affording the parents due process rights. 20 U.S.C. 1415(e)(3); 34 C.F.R. 300.513; Section 162.955, RSMo 1978. We note, however, that whenever the Department of Mental Health decides to discharge a school-aged patient from a facility outside that patient's domiciliary district because inpatient treatment or habilitation is no longer necessary (we understand that the decision to discharge is based on a professional assessment that treatment in each individual case in the DMH facility is no longer necessary or in the child's best interests), DMH must continue to permit residence at the facility until due process as outlined in federal and state law has been afforded the parents or the parents consent to a change in educational placement. Treatment, by state law, cannot be continued during the pendency of due process as the EHA and Chapter 162, supra, confer no due process rights on a child regarding the termination of treatment not directly referred to in an Individual Education Plan (hereafter "I.E.P."). The educational provider, whomever it may be, is responsible for the formulation of

the I.E.P. If a related service is required to be performed in an I.E.P., DMH remains responsible for that related service even if the Individual Habilitation Plan (hereafter "I.H.P.") or the Individual Treatment Plan (hereafter "I.T.P.") no longer requires such treatment and treatment is discontinued.

It is therefore our opinion that the Department of Mental Health need not consider educational factors in admission and discharge of school-aged children from treatment at its facilities and programs. However, where DMH is the provider of special educational services as set out in Section 162.970.1, DMH must comply with the provisions of the EHA and Section 162.955, supra, when admitting and discharging school-aged children from that portion of its plan of treatment or habilitation which constitutes the special educational service.

II.

The second question we answer is,

What is the responsibility and authority of the Department of Mental Health with regard to the education of and provision of related services to school-aged children suffering from mental illness or retardation who are in-patients of state mental health facilities or who are patients of the Department of Mental Health on community placement?

We believe that DMH is obligated to provide an education only for those handicapped or severely handicapped children in its care who are placed outside their domiciliary district and who are unable to leave DMH facilities or placements for educational services at the local school district. Both federal and state law require that a child be treated and educated in the least restrictive environment. See, 20 U.S.C. 1412(5)(B); 34 C.F.R. 300.550(b)(1); 34 C.F.R. 300.554; Sections 162.680.2 and 630.115. Thus, DMH's responsibility for the provision of education of children residing outside of their domiciliary district in a DMH facility or placement turns on the ability of the child to attend the local school district's special education program. With regard to those children for whom DMH is the responsible educational provider, DMH must provide education and related services.

In sum, for children who are residing outside their district of domicile as patients at a DMH facility or in a DMH placement and who cannot leave the campus to obtain educational services, it is our opinion that DMH has the same responsibilities and authority as a school district would have in order to, in the first instance, determine what constitutes an appropriate education for each child on an individual basis as outlined in the EHA regulations and regulations promulgated pursuant to Section 162.685, RSMo 1978, and to provide for that education as set out in Chapter 162. The

school district of domicile remains financially responsible for educational costs of the handicapped or severely handicapped child up to the local tax effort. Section 162.740, supra. All Department of Elementary and Secondary Education regulations and guidelines and the Missouri State Plan are to be complied with by DMH with regard to procedural safeguards required by the EHA, to the extent of its financial resources. But see, Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983).

III.

Your third question is,

What is the responsibility and authority of the State Board of Education with regard to the delivery of educational and related services to school-aged children who are in-patients of state mental health facilities?

As the state educational agency entrusted with ultimate responsibility for compliance with the EHA as well as establishing standards, promulgating regulations for special education programs and defining eligibility criteria for handicapped and severely handicapped programs, Section 162.685, supra, the State Board of Education possesses authority over the eligibility criteria for educational programming in a state mental health facility, educational evaluation and educational reevaluation of handicapped children who are patients in state mental health facilities, the content of the educational program through its approval power, the qualifications of personnel involved in the education process, and the length of each handicapped minor child's school day.

The State Board of Education also bears the ultimate responsibility to ensure compliance with federal standards and regulations under EHA. To that end, and in furtherance of that purpose, the State Board of Education has a responsibility and all necessary authority to monitor, through the procedures set forth in the Missouri State Plan, the provision of educational services within a state mental health facility to handicapped children.

IV.

Your fourth question is,

What is the responsibility and authority of a local school district with regard to the delivery of educational and related services to handicapped and severely handicapped school-aged children who are in-patients of state mental health facilities?

When DMH has placed a handicapped child in a district other than the one in which the child is domiciled and that child is unable to leave the DMH facility campus to obtain educational

services, DMH is the responsible agent for the provision of special educational and related services. Section 162.970 guarantees to educationally handicapped school-aged children residing outside their district of domicile, who are patients of state mental health facilities and programs but whom DMH determines can attend educational programs in the local school district the statutory right to be provided educational and related services by the local school district through established programs. Section 162.970. See also Section 162.725, RSMo. Note however, that the school district of domicile of a child's parents remains financially responsible up to its local tax effort, Section 162.740, supra, for services rendered to the child-patient by the district of residence or DMH. Finally, for those children who are in a DMH facility or placement which is located in the district of domicile, the local district continues in its constitutional obligation to provide education and related services irrespective of whether the child is capable of leaving the facility to obtain that education.

With regard to severely handicapped children who can attend educational programs at the local district, the legislature has mandated that the Department of Mental Health shall pay the serving district the amount by which the per pupil cost of special educational services exceeds the amount received from the domiciliary district and other state monies. Section 162.970.4, RSMo. Thus, the local district which provides special educational programs for a school-aged, severely handicapped child who is an inpatient at a DMH facility should be fully reimbursed for the education and related services for that child by domiciliary district payments, state and Department of Mental Health reimbursement.

V.

Your final question is,

When a determination has been made by the head of a mental health facility that psychiatric hospitalization of a school-aged child is no longer necessary, but the parents of a child request an educational due process hearing, is the Department of Mental Health required to provide such a hearing prior to or following discharge of the child?

Unless the school-aged patient is being provided educational programs by a local district under Section 162.970, supra, or unless the inpatient child is in his or her district of domicile, DMH is to provide or procure educational services for school-aged children in its facilities and programs. The Department of Mental Health is the educational provider; therefore it assumes the obligation to provide the due process hearing required by the EHA. The obligation to provide such due process is upon the educational provider. Section 162.955, supra, 34 C.F.R. 300.504 to 300.512.

As we noted in our answer to question one, admission and discharge from state mental health treatment programs is the responsibility of the Department of Mental Health within the parameters set out in Chapters 630, 632 and 633, RSMo. The Department may not retain patients for treatment in its facilities other than for mental health care. Further, those who are treated by the Department of Mental Health must be treated in the least restrictive environment. Sections 630.115, 632.175, 633.130, supra. The Department of Mental Health is without authority to retain in its facilities those patients who, while in need of continued mental health care and treatment, are eligible to be treated in a less restrictive environment. Nevertheless, federal law requires that during the pendency of any due process proceedings the child must remain in his or her present educational placement. 34 C.F.R. Section 300.513. Therefore, for those school-age children for whom DMH is the educational provider, DMH must provide some living accommodation during the pendency of the due process procedures, having in mind that to determine that a patient of the Department of Mental Health could be held in a facility of that Department beyond the time it has been determined that a less restrictive environment exists for such care and treatment may be dangerous to the child's health or welfare or may violate the principle that unnecessary confinement in a mental facility is constitutionally objectionable. See Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

CONCLUSION

It is the opinion of this office that:

(1) Missouri law requires the Department of Mental Health to provide special educational services to school-aged, inpatient children who reside outside the school district of their domicile and whose condition renders them unable to leave the Department of Mental Health facility to which they are assigned;

(2) The Department of Elementary and Secondary Education has the authority to monitor the provision of educational services by the Department of Mental Health, for compliance with the Education of the Handicapped Act;

(3) The Department of Mental Health is required to provide a "due process" hearing either prior to or following the discharge of a school-age child when the Department of Mental Health acts as the educational provider. If the Department of Mental Health is not acting as the educational provider, the local school district or the Department of Elementary and Secondary Education, must provide such due process hearing;

(4) The Department of Mental Health need not continue treatment or care of school-age children discharged by the Department of Mental Health pending an "educational discharge" hearing; and

(5) Section 162.970.4, RSMo, requires the Department of Mental Health to pay the serving district the amount by which the per pupil cost of special educational services exceeds the amount received from the domiciliary district and other state monies for severely handicapped school-age children in facilities or programs of the Department of Mental Health when the child is educated by the local district under Section 162.970.1, supra.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

DEPARTMENT OF SOCIAL SERVICES:
MEDICAL TECHNICIANS:
NURSES:

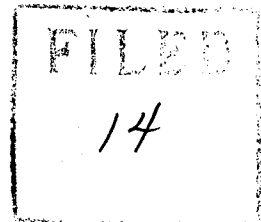
No violation of the
Nursing Practice Act
occurs when a certified
medication technician,

who does not hold himself out as a nurse licensed to practice in Missouri, provides care in an Adult Day Health Care Program that is also an Associated Adult Day Health Care Program, so long as the care associated with a licensed long-term care facility is restricted to the administration of medication, excluding injectables other than insulin.

May 14, 1984

OPINION NO. 14-84

Barrett Toan, Director
Department of Social Services
Broadway State Office Building
Jefferson City, Missouri 65101



Dear Mr. Toan:

This opinion is in response to your question:

Is it a violation of the Nursing Practices Act for a certified medication technician who is not licensed as a professional or practical nurse to provide care, with periodic monitoring by a licensed nurse, to persons in an Adult Day Health Care Program, as specified at 13 CSR 40-81.126?

13 CSR 15-11.010(17) defines the phrase "Certified Medication Technician" as follows:

A certified medication technician shall mean a nursing assistant who has completed a course in medication administration approved by the Division of Aging.

Under Section 198.082.1, RSMo Supp. 1983, anyone who is hired to work as a nursing assistant in a skilled nursing or intermediate care facility must complete a nursing assistant training program approved by the Department of Social Services. Section 198.082.2, RSMo Supp. 1983, further defines "nursing assistant" to include:

Mr. Barrett Toan

[A]n employee, including a nurse's aide or an orderly, who is assigned by a skilled nursing or intermediate care facility to provide or assist in the provision of direct resident health care services under the supervision of a nurse licensed under the nursing practice law, chapter 335, RSMo. . . .

The first question which must be answered is whether the care which a certified medication technician would provide under 13 CSR 40-81.126 falls within the scope of practical or professional nursing as defined by Sections 335.016(7) and (8), RSMo 1978. Therefore, it is necessary to examine the types of acts which 13 CSR 40-81.126 would authorize a certified medication technician to perform. The types of care are described as follows beginning at (3)(H).8 thereof:

8. Observation. The health, functional and psycho-social status of each recipient shall be observed and documented by the licensed nurse and/or certified medication technician in the recipient's record at least monthly. In the case of the certified medication technician the licensed consultant nurse must review and summarize, at least monthly, the notes on each recipient's health status. Therapy services provided must be summarized in the recipient record and progress noted at least monthly. Notes shall be made immediately of any accident, injury or illness and emergency procedures taken;

9. Medical consultation and treatment. The licensed nurse, certified medication technician and/or nurse consultant shall communicate with each recipient's physician to report observed changes in health status, including reaction to medicine and treatment, and to obtain current medical recommendations regarding such items as diet, treatment and medications. Ordered medical services shall be recorded, signed and dated by the physician;

* * *

10. Nursing services. A licensed nurse or certified medication technician with a nurse consultant shall be available at all times during the program's daily operating

Mr. Barrett Toan

hours. Nursing services must be provided in accordance with the particular needs of each recipient and must include the following:

A. Supervision of the administration of medication as prescribed by the recipient's physician;

B. Coordination of the development of the recipient care plan;

C. On-going monitoring of each recipient's health status;

D. Maintenance-therapy treatment as recommended by a therapist, and which has been prescribed by a physician; and

E. Coordination among the recipient, his/her family, and program staff members of orders from the recipient's physician.

13 CSR 40-81.126(3)(H)12.B and .C state:

B. Medication may not be administered without a written order signed by a licensed physician. Injectable medications may only be given by a licensed nurse. A certified medication technician who has been trained by the licensed nurse may give insulin injections. Medications are to be distributed by the licensed nurse and/or certified medication technician. The licensed nurse and/or certified medication technician assigned the responsibility of medication distribution shall complete the procedure by personally preparing the dose, observing the act of swallowing oral medicines, and recording it in the recipient's record on a medication sheet;

C. If a reaction to medications is observed by the licensed nurse and/or certified medication technician, the recipient's physician shall be called immediately. If contact cannot be made with the personal physician, emergency medical procedures shall be followed;

The scope of the practice of practical and professional nursing is defined in Sections 335.016(7) and (8), RSMo 1978, as follows:

Mr. Barrett Toan

(7) "Practical nursing" is the performance for compensation of selected acts for the promotion of health and in the care of persons who are ill, injured, or experiencing alterations in normal health processes. Such performance requires substantial specialized skill, judgment and knowledge. All such nursing care shall be given under the direction of a person licensed in this state to prescribe medications and treatments or under the direction of a registered professional nurse;

(8) "Professional nursing" is the performance for compensation of any act which requires substantial specialized education, judgment and skill based on knowledge and application of principles derived from the biological, physical, social and nursing sciences, including, but not limited to:

(a) Responsibility for the teaching of health care and the prevention of illness to the patient and his family; or

(b) Assessment, nursing diagnosis, nursing care, and counsel of persons who are ill, injured or experiencing alterations in normal health processes; or

(c) The administration of medications and treatments as prescribed by a person licensed in this state to prescribe such medications and treatments; or

(d) The coordination and assistance in the delivery of a plan of health care with all members of the health team; or

(e) The teaching and supervision of other persons in the performance of any of the foregoing. [Emphasis in original; revisor's note omitted.]

Initially, we are assuming that the certified medication technicians will be performing the acts in question in exchange for compensation. With that assumption in mind, we conclude that the acts described in the rules as acts which may be performed by a certified medication technician fall within the scope of practical or professional nursing. For example, observing a patient for signs of reaction to medication would fall within "selected

Mr. Barrett Toan

acts for the promotion of health and in the care of persons who are ill, injured, or experiencing alterations in normal health processes." Section 335.016(7), RSMo 1978. Such observation also appears to fall within "[a]ssessment, nursing diagnosis, nursing care, and counsel of persons who are ill, injured or experiencing alterations in normal health processes." Section 335.016(8)(b), RSMo 1978. See Sermchief v. Gonzales, 660 S.W.2d 683 (Mo. banc 1983).

Having concluded that the acts which may be performed by a certified medication technician under 13 CSR 40-81.126 include acts within the scope of practical or professional nursing, as defined in Section 335.016(7) and (8), RSMo 1978, the next issue is whether or not a certified medication technician is exempt from Section 335.076.3, RSMo 1978,^{1/} by virtue of Section 335.081(2), RSMo Supp. 1983, which states:

So long as the person involved does not represent or hold himself out as a nurse licensed to practice in this state, no provision of sections 335.011 to 335.096 shall be construed as prohibiting:

* * *

(2) The services rendered by technicians, nurses' aids or their equivalent trained and employed in public or private hospitals and licensed long-term care facilities except the services rendered in licensed long-term care facilities shall be limited to administering medication, excluding injectables other than insulin;

This exemption clearly covers certain acts of technicians performed in certain types of health care facilities. The type of facility in which the technician will perform the acts in question determines whether or not the acts of the technician will be exempt. In your question you have specified only that the care will be provided in an Adult Day Health Care Program. 13 CSR 40-81.126(1)(G) defines the term "Free-Standing Adult Day Health Care Program" as:

1/

Section 335.076.3, RSMo 1978, states in part:

No person shall practice or offer to practice professional nursing or practical nursing in this state for compensation . . . unless he has been duly licensed under the provisions of sections 335.011 to 335.096.

Mr. Barrett Toan

A program of adult day health care services which does not share staffing or licensed space or any physical components of space, equipment, furnishings, dietary, security, maintenance or utilities utilized in the provision of service with any hospital, licensed intermediate care facility or skilled nursing facility.

13 CSR 40-81.126(1)(H) defines the term "Associated Adult Day Health Care Program" as:

An adult day health care program which is connected physically with a licensed long-term care facility or hospital but has separate designated space for an adult day health care program which is above their licensed space requirement for their residents. An associated adult day health care program may share in part, staff, equipment, utilities, dietary and security with the connected long-term care facility. Recipients in the adult day health care program may participate with the residents of the long term care facility or hospital for some activities and programs.

The conclusion which we reach from these definitions is that a certified medication technician who provides care in an Adult Day Health Care Program, may be providing care in a hospital, in a licensed long term care facility, or in some other type of facility which is neither a hospital nor a licensed long-term care facility. Section 335.081(2), RSMo Supp. 1983, only provides an exemption for certain services of technicians which are performed in hospitals or licensed long-term care facilities. Therefore, it is a violation of the Nursing Practice Act for a certified medication technician to provide nursing care in an Adult Day Health Care Program which is a Free-Standing Adult Day Health Care Program.

If the Adult Day Health Care Program in which the certified medication technician is providing care is in a public or private hospital, the services provided by the certified medication technician are exempt from the Nursing Practice Act. Therefore, as long as the certified medication technician does not hold himself out as a nurse licensed to practice in Missouri, see Section 335.081, RSMo Supp. 1983, the certified medication technician will not be in violation of the Nursing Practice Act by providing nursing care in an Adult Day Health Care Program in a hospital.

Mr. Barrett Toan

If the Adult Day Health Care Program is in a licensed long-term care facility, only certain types of services are exempt under the Nursing Practice Act. In a licensed long-term care facility, the only nursing care which may be provided by a certified medication technician without violating the Nursing Practice Act is the administration of noninjectable medication and the administration of insulin. Generally, this restriction conforms to 13 CSR 40-81.126(3)(H)12.B, quoted supra. No other forms of nursing care may be provided by the certified medication technician in the Adult Day health Care Program in a licensed long-term care facility without violating the Nursing Practice Act.

CONCLUSION

It is the opinion of this office that no violation of the Nursing Practice Act occurs when a certified medication technician, who does not hold himself out as a nurse licensed to practice in Missouri, provides care in an Adult Day Health Care Program that is also an Associated Adult Day Health Care Program, so long as the care associated with a licensed long-term care facility is restricted to the administration of medication, excluding injectables other than insulin.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

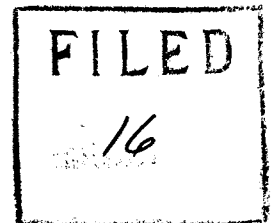
(314) 751-3321

DIRECT DIAL:

June 27, 1984

OPINION LETTER NO. 16-84

The Honorable David Doctorian
Senator, District 28
State Capitol Building, Room 433
Jefferson City, Missouri 65101



Dear Senator Doctorian:

This letter is in response to your question asking:

How far, if at all, may the Board of Trustees of the Putnam County Memorial Hospital and the Putnam County Nursing Home go in leasing their facilities or employing management assistance in the operation of the hospital.

Section 70.220, RSMo, provides that any municipality or political subdivision of this state may contract and cooperate with any private person, firm, association or corporation for operation of any facility. This contract must be within the scope of powers of the political subdivision and must be approved by the governing body of the county.

Enclosed and marked "Appendix A" you will find a copy of a document labeled PROPOSAL TO PUTNAM COUNTY MEMORIAL HOSPITAL AND PUTNAM COUNTY NURSING HOME (hereafter sometimes referred to as "Proposal"). Because the Proposal names the Putnam County Memorial Hospital Board of Trustees, we assume for purposes of this opinion that the Putnam County Memorial Hospital is organized and operating pursuant to Sections 205.160 to 205.340 and 205.374, RSMo 1978 and Supp. 1983, and is not a county hospital organized and operating pursuant to Sections 205.350 to 205.373, RSMo 1978.

The Honorable David Doctorian

The Proposal also mentions the Putnam County Nursing Home Board. Generally, county nursing homes are organized pursuant to Section 205.375, RSMo 1978. County nursing homes are under the direct control of the county courts. See, e.g., Opinion No. 414, Millan, 1967. Sections 198.200 to 198.360, RSMo 1978 and Supp. 1983, provide for the establishment of nursing home districts. Nursing home districts are governed by a board of directors. See Section 198.290, RSMo 1978. Notwithstanding the unusual organizational structure of the Putnam County Nursing Home, we assume for purposes of this opinion that it is governed by Section 205.375, RSMo 1978.

1.

Leases of County Hospital Property

In Opinion Letter No. 108, Jackson, 1980, copy enclosed, this office concluded that the county court of a third class county could lease county hospital grounds pursuant to Section 49.270, RSMo 1978; provided, that the lease is for a short term and the property leased is surplus, i.e., the property is not needed by the county or county hospital. Under Section 205.190.3, RSMo Supp. 1982, the hospital board of trustees has the exclusive control of the supervision, care, and custody of the grounds, rooms, or buildings purchased, constructed, leased or set apart for hospital purposes. Therefore, the relevant hospital board of trustees must approve any such lease of such property. Paragraph A of the Proposal goes beyond the authority of the Putnam County Court and the Putnam County Memorial Hospital Board of Trustees recognized in the above-referenced opinion letter.

2.

Leases of County Nursing Home Property

Section 205.375.4, RSMo 1978, states:

The county courts or township boards may provide for the leasing and renting of the nursing homes and equipment on the terms and conditions that are necessary and proper to any person, firm, corporation or to any non-profit organizations for the purpose of operation in the manner provided in subsection 1.

Subsection 1 of Section 205.375, RSMo 1978, defines the words "nursing home". This statute grants the county courts the authority to lease county nursing homes.

Article VI, Sections 23 and 25, Missouri Constitution, prohibit any county from granting any public money or property to private individuals, associations, or corporations. Thus, the consideration for the lease would have to equal or be greater than the fair market value of the leasehold. The Proposal does not explicitly mention any consideration for the lease of the county nursing home property. Paragraph F of the Proposal mentions the "provision of care to all patients in Putnam County." If this provision is interpreted as requiring the private contractor to provide nursing home care to indigents, the private contractor would be providing some consideration for the lease by discharging the county's obligation to support the poor pursuant to Sections 205.580 to 205.760, RSMo 1978. Whether or not this consideration is adequate is a factual matter.

3.

Operation Agreements for County Hospitals

Section 70.220, RSMo 1978, inter alia, authorizes any municipality or political subdivision of this state to contract and cooperate with any private person, firm, association, or corporation for the operation of any public improvement or facility; provided, that the subject and purposes of any such contract or cooperative action is within the scope of the powers of such municipality or political subdivision. Obviously, the operation of a county hospital is within the scope of the powers of a county. See Sections 205.160 to 205.340 and 205.374, RSMo 1978 and Supp. 1982. A county hospital is a public facility. Therefore, this statute grants the authority for county hospital operation agreements.^{1/}

1/

Section 70.210(2), RSMo 1978, defines the words "political subdivision" to include counties. County hospitals are instrumentalities of counties and are not separate political subdivisions. See, e.g., Opinion No. 113-83. Section 70.230, RSMo 1978, provides that counties may execute cooperative agreements by an order duly made and entered by the county court. Under Section 205.190.3, RSMo Supp. 1982, the hospital board of trustees has the authority to adopt such bylaws, rules, and regulations for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with Sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. Thus, the county court enters a county hospital operation contract pursuant to Section 70.220, RSMo 1978, with the condition that the hospital board of trustees may at any time terminate the contract by promulgating a bylaw, rule, or regulation prohibiting the particular type of

The Honorable David Doctorian

Missouri recognizes the common law rule that political subdivisions may not delegate or contract away their governmental functions. See, e.g., Arkansas-Missouri Power Co. v. City of Kennett, 78 F.2d 911, 918-923 (8th Cir. 1935), appeal dismissed in part, Missouri Public Service Co. v. City of Trenton, 80 F.2d 520 (8th Cir. 1935); Stewart v. City of Springfield, 350 Mo. 234, 246, 165 S.W.2d 626, 629 (banc 1942); State ex rel. Kansas City Ins. Agents' Ass'n v. Kansas City, 319 Mo. 386, 398-399, 4 S.W.2d 427, 432 (banc 1928); Farm & Home Investment Company v. Gannon, 622 S.W.2d 305, 307 (Mo. App. 1981).

We are aware of no Missouri appellate decisions dealing with hospital operation agreements and the delegation doctrine.^{2/} However, we are confident that the Proposal would strip the Putnam County Memorial Hospital Board of Trustees of many of the powers conferred upon that body by statute. For example, Section 205.190.4, RSMo Supp. 1983, provides that the board of hospital trustees shall have the power to appoint and remove a suitable chief executive officer and necessary assistants, while Paragraph J of the Proposal makes it appear that the private contractor has the authority to evaluate employee performance and fire hospital personnel. Accordingly, the Proposal would unlawfully delegate or contract away the powers of the Putnam County Memorial Hospital Board of Trustees. See also Opinion No. 21-84, copy enclosed. If the board of hospital trustees wishes to dispose of the county hospital, it may do so pursuant to the procedures codified at Section 205.374, RSMo 1978. As we read the Proposal, it proposes an unauthorized disposition of the county hospital.

4.

Operation Agreements for County Nursing Homes

We believe that a county nursing home is a public facility and that the operation of a county nursing home is within the scope of the powers of a county under Section 205.375, RSMo 1978.

(footnote continued from previous page)

operation agreement entered into. For this reason, it may be advantageous for the hospital board of trustees to promulgate a bylaw, rule, or regulation authorizing the particular type of operation agreement contemplated.

^{2/}

Related decisions of other states are difficult to reconcile. See, e.g., Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963); State Bank & Trust Co. of Richmond v. Madison County, 275 Ky. 501, 122 S.W.2d 99 (1938); Booth v. City of Owensboro, 274 Ky. 325, 118 S.W.2d 684 (1938).

The Honorable David Doctorian

See Opinion No. 18, Colley, 1959. Therefore, a county court may enter into a county nursing home operation agreement pursuant to Section 70.220, RSMo 1978. However, a county court may not delegate or contract away its governmental functions. We believe the Proposal would constitute such an unlawful delegation or contracting away of functions properly vested in the county court.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized font.

JOHN ASHCROFT
Attorney General

Enclosures: Opinion Letter No. 108, Jackson, 1980
Opinion 21-84

PROPOSAL TO
PUTNAM COUNTY MEMORIAL HOSPITAL
AND
PUTNAM COUNTY NURSING HOME
UNIONVILLE, MISSOURI

- A. Research Management Group will lease and operate Putnam County Memorial Hospital and Putnam County Nursing Home for a period of five years.
- B. Research Management Group agrees to continue the operation of Putnam County Memorial Hospital as a general acute care facility and the operation of Putnam County Nursing Home as a nursing facility during the terms of the lease.
- C. Putnam County agrees not to build or own a general acute care hospital or nursing home within the County.
- D. Research Management Group agrees to form a self-perpetuating Community Board in order to involve the local community in the policy and future direction of the Hospital and Nursing Home. The Board is to be selected as follows:
 - 1. The present Putnam County Memorial Hospital Board nominates five people to staggered three year terms.
 - 2. The present Putnam County Nursing Home Board nominates five people to staggered three year terms.
 - 3. The Medical Staff nominates one member from the medical staff to a three year term.
 - 4. Research Management Group nominates two people to staggered three year terms.

The appointment of the Community Board will be subject to the approval of the Research Health Services System. Responsibilities of the Community Board shall be pursuant to the policies established by the Research Health Services System.

- E. The Research Health Services System proposes to operate Putnam County Memorial Hospital and Putnam County Nursing Home with levels of human resources and capital which assure high quality of care.
- F. Research Management Group will continue to operate Putnam County Memorial Hospital and Putnam County Nursing Home in a manner responsive to the health care needs of the citizens of Putnam County. This would include retention of community service programs and provision of care to all patients in Putnam County.
- G. The present tax levy from the County shall be retained, but its use shall be limited to payment of bad debts incurred by Research Management Group in operating the Putnam County Memorial Hospital and for capital improvements for the Putnam County Memorial Hospital that shall remain the property of Putnam County Memorial Hospital.
- H. Research Management Group agrees to remove the County from any financial operating and capital improvement responsibility associated with the operation of the Hospital and Nursing Home.
- I. Research Management Group will maintain the physical plant and equipment in proper working condition in conformance with building code, fire marshal and licensure requirements; and will provide maintenance, repairs and replacement as needed.
- J. Research Management Group agrees to retain the existing employees of Putnam County Memorial Hospital and Putnam County Nursing Home subject to periodic evaluation of ability and the personnel requirements for the services to be rendered.
- K. Research Management Group agrees to maintain adequate fire and extended insurance coverage on the buildings, improvements and equipment.
- L. Research Management Group agrees to maintain adequate workmen's compensation insurance, general comprehensive public liability coverage and other appropriate insurance coverage; and Research Management Group agrees to indemnify and hold Putnam County Memorial Hospital and Putnam County Nursing Home harmless from any claims, demands, losses or damages arising from its use, occupancy or operation of the facilities.
- M. The final agreement will provide both parties the right to terminate the lease agreement. Putnam County Memorial Hospital and Putnam County Nursing Home would have the right to terminate the lease if Research Management Group does not continue to provide general acute care and long term care services to the Putnam

County community. If the Putnam County Memorial Hospital and the Putnam County Nursing Home terminate the agreement, they will agree to provide six months written notice and reimburse Research Management Group all accrued operating losses and capital improvements.

Research Management Group would have the right to terminate the agreement if it determines that continued operation of an acute care facility is not financially feasible. If Research Management Group terminates the agreement, it will provide six months written notice and there will be no reimbursement for operating losses or capital improvement.

- N. Subject to continuation of its obligations under the proposal, Research Management Group may assign the lease operating agreement or delegate the performance of its management or service functions thereunder to any affiliate owned or controlled by Research Health Services.
- O. This lease proposal is conditioned upon approval of the Research Health Services Board of Directors and any necessary Certificate of Need.

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

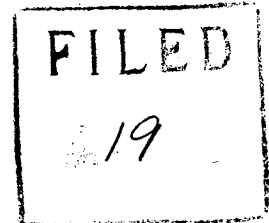
(314) 751-3321

DIRECT DIAL:

July 3, 1984

OPINION LETTER NO. 19-84

The Honorable James F. Antonio, CPA
State Auditor
State Capitol Building, Room 224
Jefferson City, Missouri 65101



Dear Dr. Antonio:

This letter is issued in response to your question asking:

Is it legally permissible for the Department of Elementary and Secondary Education to have bank accounts outside the state treasury which accounts are used for receipts and disbursements relating to the child nutrition programs at some of the state schools for the severely handicapped?

The General Assembly has designated the State Board of Education as the body to operate a system of schools denominated as the State Schools for Severely Handicapped Children. Section 162.725.1, RSMo 1978; Section 162.730.1, RSMo Supp. 1983 ("which schools or programs shall be referred to herein as 'state schools for severely handicapped children.'"). The State Schools for Severely Handicapped Children, the Missouri School for the Blind at St. Louis, and the Missouri School for the Deaf at Fulton are all within the Division of Special Services of the Department of Elementary and Secondary Education. Section 162.730.2, RSMo Supp. 1983; Section 5.4 of the Omnibus State Reorganization Act of 1974, App. B, RSMo 1978; Departmental Plan of the Department of Elementary and Secondary Education, App. C(1), RSMo Supp. 1983. The General Assembly has granted to the State Board of Education broad authority to "determine and approve all policies for the operation of said schools or programs." Section 162.730.3(3), RSMo Supp. 1983.

We are informed that as part of the operation of the eighteen (18) Schools for Severely Handicapped Children, separate bank accounts have been established and are maintained to fund

The Honorable James F. Antonio, CPA

the child nutrition programs at several of the individual Schools for Severely Handicapped Children. Each account is held in the name of the state school involved^{1/}, and requires the signatures of the teacher in charge^{2/} and the area supervisor for every check drawn on the account. The children and staff at the various schools pay amounts for their lunches served on the premises, which are deposited into these accounts. Federal and state subsidies and grants are received and deposited into these accounts also. Employees of the Department of Elementary and Secondary Education at the state level may not write checks on any of these accounts and funds may be withdrawn for the nutrition program only with the signatures indicated above.

Article IV, Section 15, Missouri Constitution, states in part:

The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury,

The operation of a predecessor of this constitutional provision has been construed in the leading case of State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 305 Mo. 57, 264 S.W. 698 (banc 1924). Therein, the State Treasurer brought an action in mandamus to compel the Board of Regents of the Northeast Missouri State Teachers' College to pay certain fire insurance proceeds collected by the Board over to the State Treasurer. In the Thompson case, the court defined the phrase "revenue collected and money received by the state from any source whatsoever", Article IV, Section 43, Missouri Constitution (1875), in the following manner:

By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as

1/

The name of each account appears substantially as "State School number _____, School Food Service, Department of Elementary and Secondary Education". The number of the appropriate school is inserted in the name designation.

2/

The teacher in charge functions in the traditional role of a principal in the public schools.

The Honorable James F. Antonio, CPA

our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature.

305 Mo. at 64-65, 264 S.W. at 700 (emphasis added). Compare this definition of the term "revenue" with the definitions of such term found at Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. banc 1983) and State Highway Commission v. Spainhower, 504 S.W.2d 121, 127 (Mo. 1973).

Applying this standard to the facts at issue in Thompson, the court stated:

II. In the foregoing discussion of the constitutional provision invoked by relator, we have stated generally that no statute required the payment into the state treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money.

305 Mo. at 67, 264 S.W. at 701 (emphasis added).

In our view, the Thompson case clearly stands for the proposition that a statute requiring the deposit of moneys into the state treasury is a precondition to the application of Article IV, Section 15, Missouri Constitution.

Section 33.080, RSMo 1978, states in part:

All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals of not more than thirty days, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the general assembly for the parti-

cular purpose or fund for which collected during the biennium in which collected and appropriated. . . . Any official or any person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that all such money received by the curators of the university of Missouri except those funds required by law or by instrument granting the same to be paid into the seminary fund of the state, is excepted herefrom, and in the case of other state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations; gifts or grants from the federal government, private organizations and individuals; funds for or from student activities; farm or housing activities; and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same; and hospital fees. All of the above excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly.

(Emphasis added.)

Section 136.010.2, RSMo 1978, states:

All money payable to the state, including gifts, escheats, penalties, federal funds, and money from every other source payable to the state shall be promptly transmitted to the division of taxation and collection; provided that all such money payable to the curators of the university of Missouri, except those funds required by law or by instrument granting the same to be paid into the seminary fund of the state, is excepted herefrom, and in the case of other state educational institutions there is excepted herefrom, gifts or trust funds from whatever source, appropriations, gifts or grants from the federal government, private organizations and individuals, funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same,

The Honorable James F. Antonio, CPA

and hospital fees. All of the above excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly.

(Emphasis added.)

When read with Thompson, these statutes establish an exemption from Article IV, Section 15, Missouri Constitution, for "state educational institutions". The phrase "state educational institutions" is not defined with reference to Sections 33.080 and 136.010.2, RSMo 1978. Cf. Section 176.010(5)(a)-(e), RSMo Supp. 1983 (defining the phrase "state educational institutions" for purposes of Chapter 176, RSMo 1978 and Supp. 1983).

Section 110.010.1, RSMo 1978, includes the Missouri School for the Deaf and the Missouri School for the Blind in the security provisions of the statutes governing the deposit of public funds in local depositories. We believe that the inclusion of the Missouri School for the Deaf and the Missouri School for the Blind in the provisions of Section 110.010.1, RSMo 1978, evidences a legislative intent that such schools be allowed to have local bank deposits; i.e., that such schools are "state educational institutions". The Missouri School for the Deaf, the Missouri School for the Blind, and the State Schools for Severely Handicapped Children are all combined within the Division of Special Services of the Department of Elementary and Secondary Education. See., e.g., Section 162.730.2, RSMo Supp. 1983; Departmental Plan of the Department of Elementary and Secondary Education, App. C(1), RSMo Supp. 1983. We find no persuasive rationale supporting the conclusion that the Missouri School for the Deaf and the Missouri School for the Blind are state educational institutions, but that the State Schools for Severely Handicapped Children are not state educational institutions. Either all of these schools are state educational institutions or all of them are not. The inclusion of the Missouri School for the Deaf and the Missouri School for the Blind in the local depository agreement statutes, Chapter 110, RSMo 1978 and Supp. 1983, shows that all of these institutions are state educational institutions for purposes of Sections 33.080 and 136.010.2, RSMo 1978. This is consistent with the common law definition of an educational institution found at State ex rel. Kaegel v. Holkamp, 151 S.W.2d 685, 690 (Mo. App. 1941) ("[T]he ordinance obviously contemplates schools in the usual sense, that is, institutions of learning which exist independently as such; have a definite curriculum or course of study; and are designed to serve as the medium for importing to students who attend them a knowledge of those things broadly covered within the field of education.").

The Honorable James F. Antonio, CPA

Having concluded that the Schools for Severely Handicapped Children are state educational institutions for purposes of Sections 33.080 and 136.010.2, RSMo 1978, the only remaining question is whether the types of moneys at issue fit into the "state educational institution" exemption in those statutes. Three types of moneys are deposited into the accounts in question: (1) federal grants and subsidies, (2) state appropriations, and (3) amounts paid by students and staff for lunches. The first two types of moneys are specifically exempted from deposit in the state treasury by Sections 33.080 and 136.010.2, RSMo 1978. The third item--lunch moneys--appears to fall into the category of "funds for or from student activities", Sections 33.080 and 136.010.2, RSMo 1978, insofar as meal time for students in the Schools for Severely Handicapped Children represents an integral part of the nutrition program of such schools.

Accordingly, it is the opinion of this office that, pursuant to Section 162.730.3(3), RSMo Supp. 1983, the State Board of Education may establish a policy of allowing the State Schools for Severely Handicapped Children to have bank accounts outside the State Treasury for receipts and disbursements relating to the child nutrition programs of such schools. We encourage the State Board of Education to formalize such policy and to establish written rules regulating these deposits.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized font. The first name "John" is written with a large, looping 'J'. The last name "Ashcroft" is written with a large, looping 'A' and a trailing flourish.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

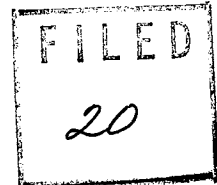
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

April 12, 1984

OPINION LETTER NO. 20-84

The Honorable Danny Staples
Senator, District 20
State Capitol Building, Room 418A
Jefferson City, Missouri 65101



Dear Senator Staples:

This letter is in response to your following statement and questions:

Committee of Terre Du Lac, located in St. Francois County have asked me to get an Attorney General's opinion if the county court of St. Francois County forms a special road district for the committee of Terre Du Lac, which totals 4,400 acres of land and approximately 6.5 acres which has 2 1/2 miles of county road going completely through the property. The question is, can a special road district be confined to the local boundaries of the property and could the Terre Du Lac Association have total authority on traffic control, and does it have to be open to the public, under state law?

It is our understanding that St. Francois County is a second class, nontownship county; that the Terre Du Lac Association is a not-for-profit corporation formed for homeowners and community improvement purposes in an unincorporated area; and that no incorporated city, town, or village exists in the proposed area for the special road district.

We believe your questions are essentially as follows: (1) May property owners in Terre Du Lac petition the St. Francois County Court to form a special road district encompassing Terre Du Lac? (2) If such a special road district is formed, who is

The Honorable Danny Staples

responsible for the maintenance of the two and one-half (2 1/2) miles of county roads in Terre Du Lac? (3) Does the Terre Du Lac Association have the authority to control traffic in the district? (4) Do roads in such a district have to be open to the public?

Chapter 233, RSMo, authorizes the formation of three different types of special road districts: (1) eight-mile-square special road districts, Sections 233.010 to 233.165, RSMo 1978, (2) nontownship county special road districts, Sections 233.170 to 233.315, RSMo 1978 & Supp. 1983, and (3) township county special road districts, Sections 233.320 to 233.445, RSMo 1978. We believe it is important, in the context of your question to note that these provisions relate to public roads and not private roads. It is axiomatic that public equipment and materials cannot be used on private roads.

Because St. Francois County is a nontownship county, the township county special road district laws do not apply.

Section 233.010, RSMo 1978, states:

Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as herein set forth into a special road district; provided, however, the provisions of this section shall not apply to counties under township organization or to class one counties.

Because, under the facts you present, there is no city, town, or village containing less than one hundred thousand inhabitants in the area proposed for the special road district, the Terre Du Lac area may not be organized into an eight-mile-square road district.

Section 233.170, RSMo 1978, authorizes county courts in nontownship counties to form special road districts under the provisions of Sections 233.170 to 233.315, RSMo 1978 and Supp. 1983, so long as the district is included wholly within the county organizing it, such district contains at least six hundred forty (640) acres, and the county court is not authorized to divide the territory within the corporate limits of a city having a population of one hundred fifty thousand (150,000).

Because the proposed district exceeds an area of six hundred forty (640) acres, and, we assume for purposes of this opinion, the proposed area for the district is wholly located within St.

The Honorable Danny Staples

Francois County, we believe it is lawful for the St. Francois County Court to form a special road district in the Terre Du Lac area under the provisions of Sections 233.170 to 233.315, RSMo 1978 and Supp. 1983. The procedure for forming such a district is specified in Section 233.175, RSMo 1978.

As to the question of the responsibility for maintenance of the two and one-half (2 1/2) miles of "county" roads in the proposed special road district, Section 233.190.2, RSMo 1978, states:

Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe.

This statute provides that the commissioners of the special road district have the sole, exclusive, and entire control and jurisdiction to construct, improve, and repair all public highways, bridges, and culverts located in the special road district. Accordingly, once the special road district is formed, maintenance and repair of the two and one-half (2 1/2) miles of "county" roads would be the responsibility of the special road district. Whether it is practical to form such a district to maintain but two and one-half (2 1/2) miles of road, is a matter which the county court must consider.

The third question is whether the Terre Du Lac Association has the authority to control traffic in the proposed district. It is our understanding that the Terre Du Lac Association is a not-for-profit corporation formed for homeowner and community improvement purposes. This office is unaware of any statutory provision authorizing a not-for-profit corporation to control traffic on public roads.

The Honorable Danny Staples

The fourth question is whether the proposed special road district could put a gate or other obstacle on the road, so that the road is no longer open. Section 233.190.2, RSMo 1978, grants the commissioners of the proposed district authority over public highways. If a highway is closed, it would not be a public highway. We are aware of no provision of law authorizing a special road district to close highways. We, therefore, conclude that such highways must be open to the public at all times.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

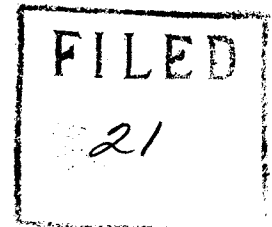
(314) 751-3321

June 27, 1984

DIRECT DIAL:

OPINION LETTER NO. 21-84

The Honorable James R. Strong
Senator, District 6
State Capitol Building, Room 417
Jefferson City, Missouri 65101



Dear Senator Strong:

This letter is in response to your request for an opinion on the following questions:

Under section 205.041 [sic] it states that a hospital board shall have exclusive power over all monies and property. The following questions concerning a contract between a hospital board and a research management have been raised.

1. Can such hospital officials sign away their powers or any part thereof?
2. Is the hospital board required to have three (3) proposals and make these proposals public knowledge?
3. Can a hospital board member be legally seated on a hospital board with his spouse working for the hospital?
4. Should the attorney for the hospital board be given time to evaluate a contract before it is signed by its members?

In answer to your first question, we are enclosing a copy of Opinion No. 16-84, decided concurrently with this opinion. This opinion concluded that county hospital boards of trustees may not delegate or contract away their governmental functions with regard to county hospitals. We believe that opinion answers your first question.

The Honorable James R. Strong

In answer to the second question asked, we look to the statute that specifies the procedure for entering into cooperative agreements, Section 70.230, RSMo 1978, which states:

Any municipality may exercise the power referred to in section 70.220 by ordinance duly enacted, or, if a county, then by order of the county court duly made and entered, or if other political subdivision, then by resolution of its governing body or officers made and entered in its journal or minutes of proceedings, which shall provide the terms agreed upon by the contracting parties to such contract or cooperative action.

See also Section 70.300, RSMo 1978. We are aware of no statutory procedure requiring the hospital board of trustees to possess three copies of any proposed cooperative agreement. Public notice of any meeting at which such cooperative agreements are discussed would be posted under the notice provisions of the Sunshine Law, Sections 610.020, RSMo Supp. 1982; however, there is no public notice procedure specifically applicable to cooperative agreement proposals.

As to the third question posed, we find that Article VII, Section 6, Missouri Constitution, states:

Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree by consanguinity or affinity, shall thereby forfeit his office or employment.

In State ex inf. McKittrick v. Whittle, 333 Mo. 705, 63 S.W.2d 100 (banc 1933), the court held that the predecessor of the constitutional provision just quoted applies to appointments made by bodies made up of more than one person.

In State ex rel. McKittrick v. Becker, 336 Mo. 815, 81 S.W.2d 948 (banc 1935), the court held that no violation of the nepotism provision occurs if the related member of the appointing authority abstains on the vote to appoint the relative within the prohibited degree of relationship. See also State ex inf. Stephens v. Fletchall, 412 S.W.2d 423 (Mo. banc 1967).

The Honorable James R. Strong

In State ex inf. Graham v. Hurley, 540 S.W.2d 20 (Mo. banc 1976), the court held that any vote by the related board member to appoint his or her relative within the prohibited degree creates a violation of the nepotism provision, regardless of whether or not the vote was necessary to effect the appointment.

In Opinion Letter No. 354, Hazel, 1975, this office concluded that the nepotism provision is not violated if a relative within the prohibited degree is employed prior to the election of a related member of a third-class county hospital board of trustees. The opinion letter states that votes on salary increases incidental to the original employment were not prohibited by the nepotism provision (although abstention may be ethically appropriate conduct), but that a vote on the appointment or promotion of the related employee to a distinctly different position is prohibited by this provision. Accordingly, the husband of a hospital employee may be a member of a third-class county hospital board of trustees, so long as the board member abstains or otherwise does not vote on the appointment of the employee or on the promotion of such employee to a distinctly different position.

We believe that the fourth question asked is a matter of courtesy and involves the relationship between the board and its attorney; it does not involve a legal question.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Opinion No. 16-84

AGENT: Section 548.243, RSMo Supp. 1983, does not
DEPUTIES: authorize the state to reimburse a sheriff
DEPUTY SHERIFFS: for expenses incurred by an extradition a-
EXTRADITIONS: gency in returning a fugitive to Missouri
GOVERNOR: who has waived extradition; and, if the Gov-
SHERIFFS: ernor appoints an extradition agency as an
agent to receive a fugitive under Section
548.221, RSMo 1978, then such agency could be compensated by the state
pursuant to Section 548.241, RSMo Supp. 1983, upon the approval of the
Governor.

May 4, 1984

OPINION NO. 22-84

The Honorable Larry H. Ferrell
Cape Girardeau County Prosecuting Attorney
Courthouse Park
Cape Girardeau, Missouri 63755

Dear Mr. Ferrell:

This opinion is in response to your questions asking:

1. Is the Governor of the State of Missouri legally obligated to reimburse a Missouri county when that County's Sheriff's Department has entered into a written contract with an extradition agency under which that agency returns to Missouri a criminal wanted by the State of Missouri either voluntarily or pursuant to a valid extradition process?
2. Must a deputy from the County Sheriff's Department accompany the third party extradition agency before the Governor will be obligated to pay the expenses of returning the criminal to the State?

Your opinion request further states:

The Cape Girardeau County Sheriff's Department has come to the conclusion that it would be desirable to have a private extradition agency, ABBA Industries, Inc., a Florida Corporation, bring prisoners back to Missouri from other states. The Sheriff's Department is considering entering into a written contract with ABBA Industries, Inc. In general, the contract specifies the details under which the prisoner will be returned to the State of Missouri and provides that ABBA Industries is fully insured for accidents.

The Honorable Larry H. Ferrell

For purposes of this opinion, we assume that the word "voluntarily" in the first question refers to situations where the defendant has waived extradition. Viewed in this light, the first question presented asks about the reimbursement of costs to an "agent" of the relevant county sheriff (1) when extradition has been waived and (2) when extradition has not been waived.

I.

Waiver of Extradition

Section 548.243, RSMo Supp. 1983, states:

In any criminal proceeding wherein a court in this state has issued a warrant for the arrest of a person and that person was arrested in any other state, territory, or possession of the United States and that person waives extradition and consents to return to this state, all necessary expenses, which would be paid by the state if there had been extradition, incurred by the sheriff or his deputy in returning the person shall be paid to the sheriff by the state regardless of the ultimate disposition of the criminal proceedings, or if waiver of extradition is for the return of the person on charges arising out of alleged violations of section 568.040, RSMo, then payment, regardless of ultimate disposition, shall be made by the county. Such costs after such payment shall be taxed against the person and recovered by the entity paying the same, unless the person is acquitted of the criminal offense charged. [Emphasis added.]

Section 568.040, RSMo 1978, creates the crime of nonsupport.

Thus, if extradition is waived, the state is required to reimburse the sheriff for all necessary expenses which would have been paid by the state if extradition had not been waived when such expenses were incurred by the sheriff or his deputy in returning the fugitive; provided that, if extradition is waived for the return of a person charged with violating Section 568.040, RSMo 1978, then such reimbursement is made by the county.

The legal issue involved is whether expenses incurred by ABBA Industries, Inc., d/b/a Abba Extradition Agency (hereinafter sometimes referred to as "ABBA"), in returning a person who has waived extradition, for an offense other than nonsupport, are expenses incurred by the sheriff or his deputy.

The Honorable Larry H. Ferrell

In Brown Group, Inc. v. Administrative Hearing Commission, 649 S.W.2d 874, 878 (Mo. Banc 1983), the court indicated that subdelegation is the transmission of authority from the head of an agency to subordinates, and that the authority to subdelegate need not be expressed in a statute and may be implied if there is a reasonable basis for such implication.

We believe that before the subdelegation doctrine may be applied, the subordinate in question must be validly appointed. Section 70.220, RSMo 1978, authorizes any political subdivision of this state to contract with any private person, firm, association or corporation for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided that, the subject and purposes of any such contract made and entered by a political subdivision is within the scope of the powers of such political subdivision. In Opinion 93-83, copy enclosed, this office concluded that sheriffs are not political subdivisions under the definition of that term in Section 70.210, RSMo 1978, and may not enter into contracts pursuant to Section 70.220, RSMo 1978. We also note that deputy sheriffs must be residents of the county. Section 57.117, RSMo 1978. Because ABBA is a Florida corporation, it is not a resident of Cape Girardeau County, Missouri, and it cannot be appointed deputy sheriff of such county.¹ We fail to see how ABBA may be validly appointed as an agent of the sheriff. Accordingly, expenses incurred by ABBA are not expenses incurred by the sheriff or his deputy under Section 548.243, RSMo Supp. 1983. Section 548.243, RSMo Supp. 1983, does not require the Governor or the state to reimburse the sheriff for expenses incurred by ABBA in returning a fugitive to Missouri.

II.

Extradition

Article IV, Section 2, United States Constitution, and 18 U.S.C. Section 3182 (1982) require the extradition of fugitives whenever the executive authority of any state or territory demands such of the executive authority of any other state, district, or territory. See also Section 548.221, RSMo 1978.

18 U.S.C. Section 3182 (1982) and Section 548.221, RSMo 1978, authorize the Governor of Missouri to appoint an agent to receive the fugitive under the extradition process.

The expenses of an extradition are governed by 18 U.S.C. Section 3195 (1982) and Section 548.241, RSMo Supp. 1983.

18 U.S.C. Section 3195 (1982) states in part:

¹We do not address the question whether a corporation may be appointed as a deputy sheriff if it is a resident of the county.

The Honorable Larry H. Ferrell

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

. . .

Section 548.241.1, RSMo Supp. 1983, states:

Except as in this section otherwise provided, all expenses accruing under section 548.221, upon being ascertained to the satisfaction of the governor, shall be allowed on his certificate and paid out of the state treasury as other demands against the state. [Emphasis added.]

It has been stated that the Governor alone has the authority to approve vouchers for extradition expenses. See State ex rel. See v. Allen, 180 Mo. 27, 79 S.W. 164 (banc 1904).

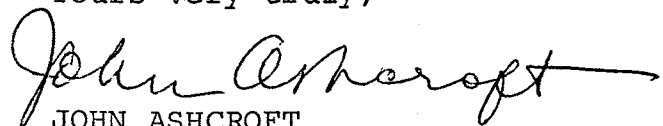
Thus, if the Governor appointed ABBA as agent to receive the fugitive, then ABBA could be compensated by the state upon the approval of the Governor. However, if the Governor appoints the sheriff as the receiving authority, then, as discussed supra, the sheriff has no authority to subdelegate that duty to ABBA.

In light of our answer to the first question posed, the second question presented is moot.

CONCLUSION

It is the opinion of this office that: (1) Section 548.243, RSMo Supp. 1983, does not authorize the state to reimburse a sheriff for expenses incurred by an extradition agency in returning a fugitive to Missouri who has waived extradition; and (2) if the Governor appoints an extradition agency as an agent to receive a fugitive under Section 548.221, RSMo 1978, then such agency could be compensated by the state pursuant to Section 548.241, RSMo Supp. 1983, upon the approval of the Governor.

Yours very truly,


JOHN ASHCROFT
Attorney General

Enclosure:

Opinion No. 93-83, Wilson, July 18, 1983

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

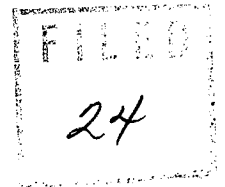
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

January 12, 1984

OPINION LETTER NO. 24-84

The Honorable Estil Fretwell
Representative, District 1
State Capitol Building, Room 401B
Jefferson City, Missouri 65101



Dear Representative Fretwell:

This opinion letter is in response to your question asking:

Is it proper for a county recorder of deeds to charge a fee for a copy of a deed from a contractor who is preparing maps of the county to be used in preparing materials for use in the general reassessment of the county?

Section 59.310.3(2), RSMo Supp. 1982, states:

3. Recorders shall be allowed fees for their services as follows:

. . . ;

(2) For copying or reproducing any recorded instrument: a fee not to exceed \$1.00 for each page; . . .

Generally the state and its agencies are not to be considered within the purview of a statute, however general and comprehensive the language used, unless an intention to include the state and its agencies is clearly manifest, especially where liabilities would be imposed on the state or its agencies. Hayes v. City of Kansas City, 362 Mo. 368, 374, 241 S.W.2d 888, 892 (1951); City of Poplar Bluff v. Knox, 410 S.W.2d 100, 103-104 (Mo. App. 1966). Here, the issue is whether the same rule applies to government contractors.

The Honorable Estil Fretwell

In Paulus v. City of St. Louis, 446 S.W.2d 144 (Mo. App. 1969), the court dealt with the following factual situation. Paulus was the general contractor for the construction of a state hospital building. The land upon which the building was being constructed was owned by the State of Missouri. The contract between Paulus and the state provided that the contractor was to pay "all permits, licenses, certificates, inspections and other legal fees required by all applicable Municipal Ordinances and the State and Federal Laws." 446 S.W.2d at 147. A provision of the City's building code provided that no permit was to be issued except to the legal owner of the land and various other parties not relevant here. The court assumed that this provision applied to general contractors.

The court recognized the rule that the state's property is not subject to legislatively-imposed liabilities or regulation, unless the legislative intention to regulate or impose liabilities on the state's property is manifest or the state has waived its right to regulate its property. The court in Paulus found no such intention or waiver and concluded that the building permit fee should not be charged.

Records of the recorder of deeds are county records. Section 109.270, RSMo 1978. However, copies of those records are not necessarily county property. The ownership of these copies is not a matter properly addressed in an Attorney General's opinion. If these copies are the property of the county, under the reasoning of the Paulus case, a liability or fee may not be imposed against one who contracts with the county regarding county property, unless a legislative intention to impose a liability on the county is clearly manifest or the county has waived its "immunity" from liability. Section 59.310.3(2), RSMo Supp. 1982, does not manifest a clear intent to impose fees on governmental entities, including counties. We are not aware of any applicable general waiver.

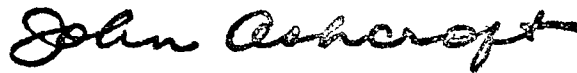
If these copies are not the property of the county, they may be the property of the state. In the situation you describe, the contractor obtained copies of the deeds in order to prepare maps for use in the general reassessment of the county. Reassessment is mandated by Section 137.750, et seq., RSMo Supp. 1982. Pursuant to Section 137.750.2, the state pays up to seventy-five (75) percent of the cost of reassessment. Thus, any fee paid by a contractor for county deeds would be absorbed in large measure by the state; the remaining cost would be absorbed by the county itself. While the recorder of deeds is authorized to charge a fee for copying, he may not do so here where the liability would be

The Honorable Estil Fretwell

imposed upon the state or its subdivisions, of which a county is one, and where the intention to include the state and its subdivisions within the purview of the statute is not clearly manifest.

Therefore, it is the opinion of this office that Section 59.310.3(2), RSMo Supp. 1982, does not impose fees on persons who contract with a county, if the copies made are the property of the county or state and if neither the county nor state have waived their rights not to pay such fees.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

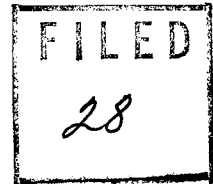
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

April 12, 1984

OPINION LETTER NO. 28-84

The Honorable M. Roger Carlin
McDonald County Prosecuting Attorney
Post Office Box 566
Pineville, Missouri 64856



Dear Mr. Carlin:

This letter is rendered in response to your question asking:

Whether McDonald County Missouri, a County of the Third Class, with a population of 14,970 persons, pursuant to the 1980 census report, may secure an assistant prosecuting attorney and cause the salary of the assistant to be paid from the county Treasury funds, or whether the salary would be paid from the funds provided for payment of the Prosecuting Attorney's salary.

Section 56.240, RSMo 1978, states:

The prosecuting attorney in counties of the third and fourth classes may appoint one assistant prosecuting attorney who shall possess all the qualifications of a prosecuting attorney and be subject to all the liabilities and penalties for failure or neglect to discharge his duty to which prosecuting attorneys are liable. The appointment of the assistant prosecuting attorney shall be made in writing and filed by the prosecuting attorney, and such assistant prosecuting attorney shall take and subscribe to the oath or affirmation of office required of prosecuting attorneys, which appointment and oath or affirmation of office shall be filed in the office of the clerk of the circuit court of the county. The assistant prosecuting attorney shall discharge the duties of the prosecuting attorney when

the prosecuting attorney is sick or absent from the county, or when the prosecuting attorney is engaged in the discharge of the duties of his office so that he cannot attend. In counties of the third class the assistant prosecuting attorney shall assist the prosecuting attorney in any case when requested to do so by the prosecuting attorney, but the former shall be disqualified from defending in any criminal case. The compensation of an assistant prosecuting attorney in third class counties shall be paid by the prosecuting attorney; except that, with the approval of the county court in a county of the third class which contains more than fifteen thousand inhabitants or in a county of the third class which contains part of a city of at least three hundred thousand inhabitants, an assistant may be paid out of the county treasury an annual salary not to exceed one-half the salary of the prosecuting attorney of that county. In counties of the fourth class the assistant prosecuting attorney shall be paid only by the prosecuting attorney and may assist the prosecuting attorney at his request in any case and the former shall not be disqualified from defending in any case, civil or criminal, except those in which he has acted as assistant prosecuting attorney. [Emphasis added.]

Section 454.405, RSMo Supp. 1983, states in part:

1. Each county shall cooperate with the division in the enforcement of support obligations under the state plan by appropriating a sufficient sum of money for the offices of the prosecuting attorney and the circuit clerk to enable those offices to perform any duty imposed under this law or any other law with respect to the enforcement of support obligations or to the transmittal of support moneys to the division for deposit in the state treasury to the credit of the child support enforcement fund.

2. For the purpose of utilizing the resources of the counties in the enforcement and collection of support obligations the director shall enter into cooperative agreements with county governing bodies, circuit

The Honorable M. Roger Carlin

courts, and circuit clerks and prosecuting attorneys. The contracts to be executed shall provide, as a minimum, for the following:

. . . ;

(2) For the city or county, upon recommendation of the prosecuting attorney, to hire such additional assistant prosecuting attorneys as may be required to administer the child support enforcement program within that jurisdiction;

. . . ;

3. The limitations set out in chapter 56, RSMo, regarding the salaries and the number of assistant prosecuting attorneys and the stenographic or administrative personnel shall not apply, and the county or city governing body shall appropriate sufficient funds to compensate such additional staff for implementing the provisions of the child support enforcement program. [Emphasis added.]

In Opinion No. 89, Tomlinson, 1950, copy enclosed, this office concluded that a predecessor of Section 1.100, RSMo 1978, governs the determination of population for purposes of a predecessor of Section 56.240, RSMo 1978. Accordingly, the 1980 census population figures became effective January 1, 1981.

We take notice of the fact that there is no city with a population of at least 300,000 in McDonald County and, under Section 1.100, RSMo 1978, the population of McDonald County is less than 15,000. Accordingly, the compensation of an assistant prosecuting attorney in McDonald County is to be paid by the Prosecuting Attorney.

The only part of the assistant's salary that must be paid by McDonald County is that part attributable to the assistant's child support enforcement duties. Section 454.405.3, RSMo Supp. 1983.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Opinion No. 89, Tomlinson, 1950

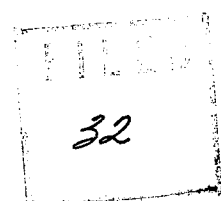
DIVORCE:
DOMESTIC VIOLENCE:
FEES:
MARRIAGE DISSOLUTION FEES:
MARRIAGE LICENSE FEES:
SHELTERS FOR VICTIMS OF DOMESTIC VIOLENCE:

A Missouri, not-for-profit corporation operating as a shelter for victims of domestic violence and receiving funds under Sections 455.200 to 455.230, RSMo Supp. 1983, may use such funds to establish a network of safe homes in private residences. Such funds may be used to provide medical and personal items if such are incident to the residential services and facilities provided by the shelter.

March 9, 1984

OPINION NO. 32-84

The Honorable Jack L. Miller
Laclede County Prosecuting Attorney
201 West Commercial Street
Lebanon, Missouri 65536



Dear Mr. Miller:

This opinion is in response to your question asking:

Whether or not money derived under section 455.200, et seq. RSMo may be used to defer costs of private housing along with medical and personal items for battered spouses and children during the period of time in which they are away from their homes.

Sections 455.200 to 455.230, RSMo Supp. 1983,^{1/} originated as Sections 2 to 8 of H.B. 1069, 1982 Missouri Laws 374, 376-378. Section 455.205.1 authorizes the governing body of each county and the City of St. Louis to impose, by order or ordinance, a fee of five dollars (\$5.00) on the issuance of a marriage license and a fee of ten dollars (\$10.00) upon the entry of a decree of dissolution of marriage by a circuit court under the provisions of

1/

All statutory references are to RSMo Supp. 1983, unless otherwise indicated.

The Honorable Jack L. Miller

Section 452.305, RSMo, to be paid by the party who filed the dissolution petition.^{2/} The recorder of deeds collects the marriage license fees, and the clerk of the court collects the dissolution decree fees. Section 455.205.2. These officials file a verified, monthly report of the fees so collected with the "county court". Section 455.205.3. Upon the filing of this report, the recorder of deeds and the clerk of the circuit court pay the fees over to the county treasurer who deposits the fees into a special fund in the county treasury "to be expended only to provide financial assistance to shelters for victims of domestic violence as provided in Sections 455.200 to 455.230." Section 455.205.3 (emphasis added).

Section 455.210 authorizes the governing body of the county or the City of St. Louis to designate, by order or ordinance, an appropriate board, commission, agency, or other body of the county or city as the authority to administer the allocation and distribution of the funds to shelters for victims of domestic violence.

Section 455.215 establishes how shelters for victims of domestic violence may apply to the designated authority for funds from the "domestic violence fund" in the county or city treasury. One of the requirements is that the shelter show evidence that it is a Missouri, non-profit corporation. Sections 455.215.1(1) and 455.220.1(1).

Section 455.200(4) defines the term "shelter for victims of domestic violence" as:

[A] facility established for the purpose of providing temporary residential service or facilities to family or household members who are victims of domestic violence.

Section 455.200(3) defines the term "family or household member" as:

[A] spouse, a former spouse, person living with another person whether or not as spouses, parent, or other adult person related by consanguinity or affinity, who is residing or has resided with the person committing the domestic violence and dependents of such persons;

^{2/}

Article X, Section 22(a), Missouri Constitution, requires voter approval of these fees prior to their imposition. See Roberts v. McNary, 636 S.W.2d 332 (Mo. banc 1982).

The Honorable Jack L. Miller

Section 455.200(2) defines the term "domestic violence" as:

[A]ttempting to cause or causing bodily injury to a family or household member, or placing a family or household member by threat of force in fear of imminent physical harm;

The legal issues presented by your question are: (1) Whether a Missouri, not-for-profit corporation purporting to act as a shelter for victims of domestic violence may establish a network of "facilities"^{3/} (sometimes referred to as "safe homes") in various private residences^{4/} throughout the county or city in question for the purpose of providing temporary residential services and facilities; and (2) Whether the provision of limited medical care and "personal items" to family or household members is within the scope of the term "temporary residential service or facilities" in Section 455.200(4).

I.

Network of Safe Homes

In State ex rel. Williams v. Marsh, 626 S.W.2d 223, 226-227 (Mo. banc 1982), the court indicated that the Adult Abuse Act, Sections 455.010 to 455.085, RSMo Supp. 1980, was part of a national trend to legislate on the subject of remedies for domestic violence. Likewise, H.B. 1069 is a part of a nationwide trend to enact funding mechanisms for domestic violence shelters through marriage license fees or marriage dissolution fees. See, e.g., Ala. Code Section 30-6-11 (1983 Repl. Vol.) (\$5.00 marriage license fee); Ariz. Rev. Stat. Ann. Sections 11-554.A.16 and 25.311.01.E (Supp. 1983-1984) (80% of \$10.00 marriage license fee and \$6.00 per party dissolution fee, respectively); Cal. Government Code Sections 26840.7 and 26840.8 (West's Supp. 1984) (\$13.00 marriage license fee and \$13.00 marriage authorization fee,

3/

Section 455.200(4) defines the term "shelter for victims of domestic violence" as a single facility. In legislative enactments, the singular includes the plural. Gladden v. Kansas City, 536 S.W.2d 478, 480 (Mo. App. 1976). Therefore, the use of the singular word "facility" in the definition of the term "shelter for victims of domestic violence" does not preclude a shelter from having multiple facilities.

4/

As we read the words "private housing" in the question asked, hotels and motels are not within the scope of the question presented; rather, private housing, as we read that term in the question asked, refers only to private residences.

The Honorable Jack L. Miller

respectively); Fla. Stat. Ann. Section 741.01(2) (West's Supp. 1983) (\$10.00 marriage license fee); Idaho Code Section 39-5213 (Supp. 1983) (\$15.00 marriage license fee); Ill. Ann. Stat. ch. 25, Section 27.2(1)(d) and ch. 53, paragraph 35, Section 18 (Smith-Hurd Supp. 1983-1984) (\$5.00 dissolution fee in certain counties and \$10.00 marriage license fee, respectively)^{5/}; Ind. Code Ann. Section 4-23-17.5-4(b) (Burns 1982 Repl. Vol.) (\$10.00 dissolution fee); Kan. Stat. Ann. Section 23-108 and 23.110 (1981) (56% of a \$10.00 marriage license fee); Ky. Rev. Stat. Section 209.160 (1982 Repl. Vol.) (\$10.00 of \$14.00 marriage license fee); Md. Ann. Code Art. 62, Section 14(b) (1983 Repl. Vol.) (marriage license fee of up to \$15.00 under county group plan); Mich. Comp. Laws Ann. Section 551.103(2) (Supp. 1983-1984) (\$15.00 of \$20.00 marriage license fee to be used for "family counseling services, which shall include counseling for domestic violence and child abuse."); Minn. Stat. Ann. Section 357.021.2a (Supp. 1984) (\$35.00 of \$55.00 marriage dissolution fee to be used for emergency shelter and support services for battered women and administering displaced homemaker programs); Mont. Code Ann. Section 40-2-405(1) (1983) (revenue from marriage license fees and fees collected for filing a declaration of marriage without solemnization is the primary source of funding); Nev. Rev. Stat. Section 122.060.4 (1983) (\$5.00 marriage license fee); N.H. Rev. Stat. Ann. Section 457:29 (1983 Repl. Ed.) (\$13.00 marriage license fee); N.J. Stat. Ann. Section 37:1-12.1 (Supp. 1983-1984) (\$5.00 marriage license fee); N.D. Cent. Code Section 14-03-22 (1981 Repl. Vol.) (\$19.00 of \$25.00 marriage license fee); Ohio Rev. Code Ann. Section 106.045(1) (1983 Repl. Part) (\$20.00 marriage license fee); S.D. Codified Laws Section 25-1-10 (Supp. 1983) (\$15.00 of \$25.00 marriage license fee).

In comparing Missouri's legislative enactment with the domestic violence shelter statutes of other states, two propositions are clear: First, Missouri did not enact minimum standards or licensing requirements for the facilities, as have other states, e.g., Ala. Code Sections 30-6-1(4) and 30-6-3(a)(5) (1983 Repl. Vol.) (Prosecuting Attorneys' Offices make annual compliance evaluations). Missouri's lack of minimum standards for facilities shows that there are no compliance or licensing standards serving as impediments to private residences acting as "facilities" for purposes of Section 455.200(4). Second, the services that can be funded with marriage license fees and dissolution fees under the Missouri statutes are relatively limited, i.e., the provision of temporary residential services and facilities. Sections 455.200(4) and 455.220.1(4). Not included in this list of services are legal advocacy services, telephone

5/

But see Crocker v. Finley, Nos. 58056, 58062, and 58085, consolidated (Ill. February 1, 1984).

The Honorable Jack L. Miller

"hotline" services, psychological and employment counseling services, and child care services, as is provided for in the enactments of other states, e.g., Cal. Welf. & Inst. Code Sections 18294 and 18295 (West's Supp. 1984); Mont. Code Ann. Section 40-2-404 (1983). Obviously, temporary residential services and facilities can be provided from a private residence. The lack of compliance standards and the emphasis on residential services show that private residences may act as "facilities" for purposes of Section 455.200(4).

II.

Medical and Personal Items

As previously stated, the services that can be provided under the Missouri domestic violence shelter statutes are limited to temporary residential services and facilities. In Stewart v. Barber, 182 Misc. 91, 43 N.Y.S.2d 560, 563 (1943), it was indicated that the use of part of a house as a physician's, dentist's, or lawyer's office destroys the character of the home as a private dwelling and such is not used exclusively for residential purposes. Thus, one could not establish a "doctor's office" with domestic violence shelter fund moneys, for such is not a residential service or facility. However, most residences have a medicine cabinet or other storage area for nonprescription medical items, e.g., bandages, aspirin, etc. The provision of such nonprescription medical items is incident to the provision of residential services or facilities and may be provided with domestic violence shelter fund moneys.

The question presented also asks whether the domestic violence shelter fund moneys may be used to provide "personal items" to victims of domestic violence. The test to be applied is whether the personal items are provided incident to the residential services or facilities provided by the shelter. Personal items provided incident to the shelter's residential services or facilities may be financed with domestic violence shelter fund moneys, e.g., toothbrushes, cosmetics, etc. Items not incident to the shelter's residential services or facilities may not be provided with domestic violence shelter fund moneys, e.g., automobiles, airline tickets, etc.

The Honorable Jack L. Miller

CONCLUSION.

It is the opinion of this office that a Missouri, not-for-profit corporation operating as a shelter for victims of domestic violence and receiving funds under Sections 455.200 to 455.230, RSMo Supp. 1983, may use such funds to establish a network of safe homes in private residences. Such funds may be used to provide medical and personal items if such are incident to the residential services and facilities provided by the shelter.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

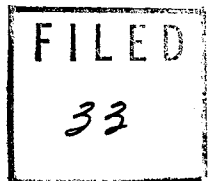
JOHN ASHCROFT
Attorney General

DRIVERS LICENSE: With respect to the chemical
DRIVERS LICENSE REVOCATION: testing procedure of Sections
DRUNKEN DRIVING: 577.020, et seq., RSMo Supp.
1983, for the purpose of
determining whether a person was driving a motor vehicle in an
intoxicated or drugged condition, that: (1) The legislature has
given motorists the right to refuse to take a chemical test,
including a blood test, upon arrest for driving while intoxi-
cated, (2) This right to refuse can be exercised at any time
prior to submitting to the test, (3) Once the individual has
clearly and unequivocally indicated his or her refusal, no test
should be conducted, even if the individual initially indicated a
willingness to take the test, (4) In the absence of such a
refusal so long as a hospital or its employee is taking a blood
sample pursuant to the request of a law enforcement officer who
has arrested the defendant, the hospital and its employees are
immune from liability except for acts which are wanton, willful
or grossly negligent, and (5) Sections 577.020 to 577.041, RSMo
Supp. 1983, do not diminish or alter the authority of law
enforcement officials to require chemical tests of the blood of a
person under arrest as outlined in Schmerber v. California, 384
U.S. 757 (1968).

August 15, 1984

OPINION NO. 33-84

The Honorable Gary Sharpe
Representative, District 13
State Capitol, Room 402
Jefferson City, Missouri 65101



Dear Representative Sharpe:

This opinion is in response to your request asking:

Reading Sections 577.020 to 577.041, RSMo, together is consent to the testing procedures, particularly the invasive procedure necessary for blood testing, provided for in the statutes, negating the need for obtaining explicit consent for the procedure at the time the procedure is administered?

To what extent, if any, is the hospital in which the test sample is obtained and the hospital's employees free from liability for participating in the procedure? [sic]

The Honorable Gary Sharpe

If a person under arrest refuses the tests, as provided for in Section 577.041, are the hospital and its personnel exposed to liability from the perspective of the law enforcement officer if the hospital and its personnel refuse to proceed with the procedure for obtaining blood or other samples without specific explicit consent from the person under arrest?

It is important to note at the outset that Sections 577.020 to 577.041,^{1/} (hereinafter sometimes referred to as the "implied consent law") address the gathering and introduction in court of chemical evidence for cases "arising out of acts alleged to have been committed by any person while driving a motor vehicle while in an intoxicated condition. . . ." Section 577.037. Pursuant to Section 577.020, any person who operates a motor vehicle on Missouri's highways is deemed to have given his or her consent to chemical tests of breath, blood, saliva or urine to determine the alcohol or drug content of his or her blood. The legislature has also provided that any person under arrest who refuses to submit to such chemical analysis shall have his or her driver's license revoked, provided statutory revocation procedures are followed. Section 577.041.

In our view, Sections 577.020 to 577.041 are not intended to alter or diminish the authority of law enforcement personnel to withdraw blood from a motorist under arrest who does not consent to the chemical test established by the United States Supreme Court in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1968).^{2/}

^{1/} All statutory references herein are to RSMo Supp. 1983, unless otherwise noted.

^{2/} The distinction we draw between Schmerber and the question you ask is an important one. In Schmerber, the United States Supreme Court approved police officers obtaining blood samples from persons suspected of driving under the influence of alcohol or drugs without a search warrant and over the express refusal of the person under arrest to submit to the blood test. The Court reasoned that the delay required to obtain a search warrant might result in a loss or destruction of evidence, given the fact that blood alcohol content diminishes through the passage of time.

We do not intend for this opinion to diminish in any way the ability of law enforcement personnel to obtain a blood sample from a person suspected of driving under the influence of alcohol or drugs when the person under arrest refuses to submit to such a test and when the person under arrest is reasonably believed by law enforcement personnel to have been involved in a related crime for which evidence of driving under the influence of

The Honorable Gary Sharpe

For this reason, the opinions herein expressed are limited to those situations in which an individual has been arrested for a state or municipal drunk driving violation in which the officer has probable cause to believe the individual has committed such a violation and, pursuant to Section 577.041, the officer requests the individual under arrest to submit to a blood test pursuant to Section 577.020. This opinion does not speak to a circumstance in which the officer has a good faith reason to believe that a blood test is necessary to provide evidence concerning the commission of a crime related to driving under the influence of alcohol or drugs. Again, we reiterate our position that Sections 577.020 to 577.041 do not diminish the applicability of the Schmerber doctrine in Missouri. See, footnote 1.

I.

Section 577.037, RSMo Supp. 1983, explicitly states that the chemical analysis performed under Section 577.020 will be admissible at trial "for violation of any of the provisions of Sections 577.005 [repealed], 577.008, 577.010, or 577.012 or upon the trial of any criminal action or violations of county or municipal ordinances arising out of acts alleged to have been committed by any person while driving a motor vehicle while in an intoxicated condition" More importantly, Section 577.037.3 provides:

The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was intoxicated.

Our principal task in rendering an opinion is to seek the intent of the legislature, Breeze v. Goldberg, 595 S.W.2d 381 (Mo. App. 1980), by examining the plain language of the statute. Staley v. Missouri Director of Revenue, 623 S.W.2d 246 (Mo. banc 1981); State ex rel. DeGraffenreid v. Keet, 619 S.W.2d 873 (Mo. App. 1981). The implied consent law was intended by the legislature to create a statutory foundation for the admission of

(footnote continued from previous page)

alcohol or drugs is germane, e.g., manslaughter. See, e.g., State v. Thompson, 674 P.2d 1094 (Mont. 1984); Van Order v. State, 600 P.2d 1056 (Wyo. 1979); State v. Heintz, 599 P.2d 385 (Ore. 1979); State v. Rubarge, 391 A.2d 184 (Conn. 1977); People v. Sanchez, 476 P.2d 980 (Colo. 1970). In addition, we note that the Fourth Amendment to the United States Constitution and Article I, Section 15, Missouri Constitution (1945), are limits on police power, protecting not against all searches and seizures, but only against "unreasonable" searches and seizures. See, e.g., Chimell v. California, 395 U.S. 752 (1969).

The Honorable Gary Sharpe

chemical tests at trial, rather than requiring that a scientific foundation be laid in each case. State v. Paul, 437 S.W.2d 98, 102 (Mo. App. 1969).

A motorist in Missouri may refuse to submit to a chemical test after arrest. City of St. Joseph v. Johnson, 539 S.W.2d 784, 786 (Mo. App. 1976). A refusal to submit to a chemical test results in revocation of a motorist's driver's or chauffeur's license. Id. at 787. Section 577.041. Under prior law, the only chemical test permitted was a breath test. McGuire v. Jackson County Prosecuting Attorney, 548 S.W.2d 272, 275 (MO. App. 1977). In 1982, the General Assembly amended the informed consent law (Senate Bill No. 513, 81st General Assembly) by, inter alia, expanding both the type and number of chemical tests to include a blood test to be administered under specific guidelines. Section 577.029.

Your question necessarily requires us to determine what constitutes a "refusal" in this state. Once again, we call your attention to our caveat that this opinion does not limit the application of Schmerber in Missouri.

Appellate cases in this state hold that "anything short of an unqualified consent is a refusal." Lowery v. Spradling, 554 S.W.2d 555, 559 (Mo. App. 1977); Spradling v. Deimeke, 528 S.W.2d 759, 765 (Mo. 1975). A statute giving certain benefits or rights to a defendant must be construed liberally in favor of that defendant. State v. Paul, supra at 103. It would seem, therefore, that a defendant would be able to exercise his "right" to refuse any time up to the actual administration of the test.

Thus, where a person verbally agrees to take a breath test but refuses to blow into the breathalyzer, the person is deemed to have refused. Spradling v. Diemeke, 528 S.W.2d 759, 766 (Mo. 1975). "The volitional failure to do what is necessary in order that the test can be performed is a refusal." Id.

It is the opinion of this office, therefore, that if a person under arrest refuses to submit to a blood test, even though he or she has previously consented to submit to such a test to the arresting officer, the person under arrest has refused under the statute and no blood test should be given. Subsequent withdrawal of consent overrules previously given consent. (We direct your attention to footnote 1, which creates an exception to this general statement in circumstances in which a law enforcement officer forms a reasonable belief that the influence of drugs or alcohol has contributed to the commission of a crime.)

It is not necessary, however, for the doctor, nurse or medical technician personally to receive the express consent from the person under arrest prior to administering a blood test. By

The Honorable Gary Sharpe

driving on the highways of this state, a motorist is deemed to have consented to a chemical test, including a blood test. Section 577.020.1 The test is not administered at the request of the defendant. "The test shall be administered at the direction of the arresting law enforcement officer whenever the person has been arrested for the offense." (Emphasis added.) Section 577.020. Section 577.029 provides that the medical professional shall withdraw the blood "acting at the request and direction of the law enforcement officers." (Emphasis added.) Id. Furthermore, under Section 577.041, it is the arresting officer who must request the person under arrest to submit to the chemical test.

Silence by the defendant is not a basis for inferring a refusal to submit to the test by the defendant. "It has been held that refusal to take the test must be express and unequivocal." Gooch v. Spradling, 523 S.W.2d 861, 865 (Mo. App. 1975). While an explicit refusal expressed to the medical technician would appear to constitute a refusal which would require such testing to cease, it is the opinion of this office that the statute does not require the person under arrest to express his or her consent to the chemical test to the medical professional before a blood test is taken.

This conclusion is buttressed by reference to Section 577.033, RSMo Supp. 1983, which states that a person who is dead, unconscious or otherwise incapable of refusing is not deemed to have withdrawn the consent implied by Section 577.020. Consent is assumed until an **express** withdrawal of that consent or an **express** refusal is made. Again we say, the hospital employee need not obtain the consent of the person under arrest before obtaining a blood sample; the hospital employee simply acts upon the request of the law enforcement officer, who derives his authority from the statute.

II.

Your second question deals with the extent of potential liability for a hospital or its employees who obtain a blood sample pursuant to Section 577.020. Section 577.031, RSMo Supp. 1983, explicitly states that no hospital or hospital employee will be civilly liable for obtaining a blood sample except for gross negligence or willful or wanton acts or omissions.^{3/}

3/

While Missouri common law generally does not recognize "degrees" of negligence and, therefore, makes no distinction between negligence and "gross negligence", Warner v. Southwestern Bell Telephone Company, 428 S.W.2d 596, 603 (Mo. 1968), it is also true that we have to presume that the legislature intended what was expressed in the plain words of the statute. DeGraf-

III.

Your third question deals with the consequences of a hospital or its employee refusing to obtain a sample upon the proper request of a law enforcement officer, should the defendant refuse to submit to the test. Section 577.029 states:

A licensed physician, registered nurse, or trained medical technician at the place of his employment, acting at the request and direction of the law enforcement officer, shall withdraw blood for the purpose of determining the alcohol content of the blood, unless such medical personnel, in his good faith medical judgment, believes such procedure would endanger the life or health of the person in custody. (Emphasis added).

Though the statute states the sample "shall" be obtained, there are no penalties imposed for failing to obtain a sample upon a proper request. More important, as we point out above, an individual who refuses to give a blood sample, or does not cooperate so that a sample may be taken, has "refused" as the term is intended in Section 577.041 and no test should be given. Recognition of the individual's statutory right to refuse by both the medical practitioner and the law enforcement officer should avoid any possible conflicts and any uncertainty as to whether the test should be conducted. However, in a Schmerber context, we believe that the hospital should cooperate with law enforcement officials and conduct the test as directed by the law enforcement officer.

The waste of human life and property wrought by drunk drivers in our society is the proper concern of all elements of our society. Hospitals have been given an important role in Missouri's enforcement scheme. We trust that Missouri's medical care community would welcome this opportunity to become a partner in keeping our highways as safe as possible through the effective enforcement of state laws relating to driving under the influence of alcohol or drugs.

(footnote continued from previous page)
fenreid v. Keet, supra. A hospital or its employees could be liable if the employee acted with gross negligence or acted wantonly or willfully. Whether such liability attaches for acts which are merely negligent is not a question which is necessary for us to resolve in this opinion.

The Honorable Gary Sharpe

CONCLUSION

It is the opinion of this office with respect to the chemical testing procedure of Sections 577.020, et seq., RSMo Supp. 1983, for the purpose of determining whether a person was driving a motor vehicle in an intoxicated or drugged condition, that:

(1) The legislature has given motorists the right to refuse to take a chemical test, including a blood test, upon arrest for driving while intoxicated,

(2) This right to refuse can be exercised at any time prior to submitting to the test,

(3) Once the individual has clearly and unequivocally indicated his or her refusal, no test should be conducted, even if the individual initially indicated a willingness to take the test,

(4) In the absence of such a refusal so long as a hospital or its employee is taking a blood sample pursuant to the request of a law enforcement officer who has arrested the defendant, the hospital and its employees are immune from liability except for acts which are wanton, willful or grossly negligent, and

(5) Sections 577.020 to 577.041, RSMo Supp. 1983, do not diminish or alter the authority of law enforcement officials to require chemical tests of the blood of a person under arrest as outlined in Schmerber v. California, 384 U.S. 757 (1968).

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

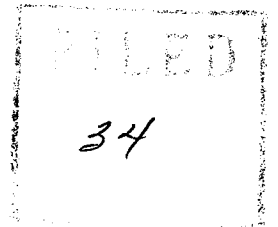
JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 21, 1984

OPINION LETTER NO. 34-84

The Honorable David L. Steelman
Representative, District 149
Post Office Box 110
Salem, Missouri 65560



Dear Representative Steelman:

This opinion is in response to your request for an opinion as follows:

Does a person who is a member of a closed corporation have a legal right to claim a deduction of school tax paid by said corporation toward non-resident tuition of said member's child for attending elementary school in the district where the tax is paid?

Tax is paid by corporation and not individual, thus, may individual use tax paid by corporation as his personal credit to off-set tuition?

For the reasons we shall express herein, it is the opinion of this office that a shareholder of a closely-held corporation may not claim a credit under Section 167.151.3, RSMo Supp. 1983, for taxes paid by the closely-held corporation.

At the heart of your opinion request is an interpretation of the meaning of the word "person" as it appears in Section 161.151.3. Section 1.020, RSMo Supp. 1983, states in pertinent part:

The Honorable David L. Steelman

As used in the statutory laws of this state unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or the the context thereof:

* * *

(10) The word "person" may extend and be applied to bodies politic incorporate and to partnerships and other unincorporated associations; [Emphasis added.]

Thus, a closely-held corporation may be a "person" for purposes of Section 167.151.3 unless the use of the word "person" to include a corporation is plainly repugnant to the intent of the legislature in its passage of said section.

Section 167.151.3 provides a method by which a person who pays a school tax in a district other than the one in which he resides can send his children to any public school in the district in which the tax is paid and receive as a credit against the non-resident tuition charged by the school district, the amount of the school tax paid to the district. A use of the word person to include a corporation in Section 167.151.3 is, in our opinion, repugnant to the intent of the General Assembly when it employed the word "person" in said section. While it is true that a corporation, as a person, may pay a tax, the use of the words "his children" indicates that the person to whom Section 167.151.3 refers must have a child over whom he exercises legal authority and who can attend the public schools. Under the fact situation you present in your question, the corporation to which you refer does not itself have children, nor does it exercise legal rights over children. The children are not "his children" (the corporation's) for purposes of Section 167.151.3.

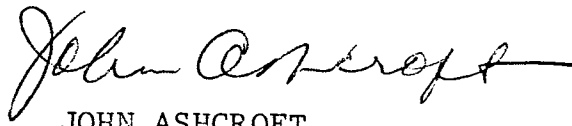
In Pierce v. National Bank of Commerce in St. Louis, 13 F.2d 40, 47 (8th Cir. 1926), cert. denied, 273 U.S. 730 (1926), the court stated:

The general doctrine is well established that a corporation is a legal entity distinct from its individual members or stockholders, and that the property or rights acquired or the liabilities incurred by the corporation, or the property, rights, and liabilities of such legal entity as distinguished from the members who compose it. . . .

The Honorable David L. Steelman

Applying this general doctrine, a shareholder of a corporation is distinct from the corporation and the shareholder may not claim credit for taxes paid by the corporation. We believe that this general rule is applicable to the question you present, and that a person who is a member of a closely-held corporation does not have a legal right to receive as a credit on tuition charged by a school district, an amount equal to a school tax paid to the district by a closely-held corporation of which the person is a shareholder.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

February 16, 1984

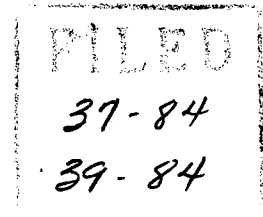
DIRECT DIAL:

OPINION LETTER NOS. 37-84 and 39-84

The Honorable Harriett Woods
Senator, District 13
State Capitol Building, Room 329
Jefferson City, Missouri 65101

and

The Honorable E. J. Cantrell
Representative, District 82
State Capitol Building, Room 300
Jefferson City, Missouri 65101



Dear Senator Woods and Representative Cantrell:

This is in response to your requests for opinions, numbered 39-84 and 37-84, respectively.

Opinion request number 39-84 (Woods) asks:

A portion of section 79.280, RSMo Supp. 1982, deals with filling a vacancy in the office of alderman in fourth class cities in St. Louis County. If the vacancy occurs "within six months of a municipal election," it is filled in the manner prescribed by ordinance. If it does not occur within six months of a municipal election, a special election is to be held to fill the vacancy.

My question is as follows:

If such an aldermanic vacancy occurs, to the date, exactly six months prior to a municipal election, is the vacancy filled by a special election or is it filled as prescribed by local ordinance?

The Honorable Harriett Woods and
The Honorable E. J. Cantrell

Opinion request number 37-84 (Cantrell) asks:

May a Fourth Class City in the County of St. Louis provide by ordinance to fill a vacancy on its board of aldermen by special election when the vacancy occurs within six months of a regular election (see Section 79.280 RSMo).

These opinion requests indicate that an alderman of Venita Park, Missouri, a fourth-class city located in St. Louis County, was elected to a two-year term of office, beginning in April, 1983, and ending in April, 1985. This alderman died on October 3, 1983. You also inform us that the terms of the Board of Aldermen of Venita Park are staggered pursuant to Section 79.060, RSMo 1978.¹ Therefore, some of the members of the Board of Aldermen of Venita Park will be up for election on April 3, 1984, the next municipal election day. See Section 115.121.3, RSMo 1978.

In Opinion No. 24, Schechter, 1965, copy enclosed, an alderman of the City of Overland was elected to office in April, 1964, for a term of two years. This alderman died on October 7, 1964. The terms of the members of the Board of Aldermen of Overland Park had staggered terms. The next municipal election at which members of the board of aldermen were elected was April 6, 1965.

Relying on City of Kirkwood v. Allen, 138 Mo. App. 478 (1909), this office concluded in Opinion No. 24, supra, that the "municipal election" to which Section 79.280 refers is the next general municipal election, despite the fact that there was approximately one and one-half years left to the unexpired term of the office vacated. Thus, pursuant to Opinion No. 24, supra, the vacancy in the Board of Aldermen must be filled at the next general election.

Following our 1965 opinion, the remaining issue for resolution in this opinion is whether the vacancy occurring on October 3, 1983, occurred within six months of the next general municipal election, which is to occur on April 3, 1984. Our answer will provide direction as to how the city must fill the vacancy--either by special election or by ordinance--until the people select an alderman at the next general municipal election.

¹There appears to be a conflict between Section 79.030, RSMo 1978, which authorizes municipal elections for all elective officers every two years, and Section 79.060, RSMo 1978, which appears to authorize staggered terms for members of the board of aldermen and annual elections for aldermen. For purposes of this opinion, we assume that Section 79.060, RSMo 1978, being the more specific statute, governs over Section 79.030, RSMo 1978.

The Honorable Harriett Woods and
The Honorable E. J. Cantrell

Section 1.020.1(6), RSMo 1978, states:

1. As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

. . . .

(6) "Month" and "year". "Month" means a calendar month, . . . ; [Emphasis in original.]

Section 1.040, RSMo 1978, states:

The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday it shall be excluded.²

In re Lynch's Estate, 254 P.2d 454, 454-455 (Utah 1953), states:

One month is a calendar month
Such a month commences at the beginning of the day of the month on which it starts and ends at the expiration of the day before the same day of the next month. Thus a month which starts with the beginning of the first day of a calendar month would end at the end of the last day of such month, and not at the last end of the first day of the next month. If the month in question commenced on a day other than the first day of such month, such as at the beginning of the 23rd day of such month, it would end at the expiration of the 22nd day of the next month and not at the expiration of the 23rd day of the next month, which would be the beginning of another month. In the present case we exclude from our calculation the day of the act or event after

²The last sentence of Section 1.040, RSMo 1978, should be compared with Rule 44.01, which excludes the last day if it is a Saturday, Sunday or a legal holiday. Section 9.010, RSMo 1978, declares any general primary election day and any general state election day to be legal holidays. Primary election days occur in August, general election days occur in November, while municipal election days occur in April. Section 115.121, RSMo 1978. Therefore, municipal election days are not legal holidays.

The Honorable Harriett Woods and
The Honorable E. J. Cantrell

which the designated period of time begins to run, which is November 22, the day on which the motion was overruled, and start counting from the beginning of the 23rd day of that month; from that time one month would end at the expiration of the 22nd day of December, or just before the 23rd commenced, which marked the beginning of another month.

See also Needham v. Moore, 292 S.W.2d 720 (Tenn. 1956).

Applying these rules to the instant factual situation, we exclude October 3, 1983, as the first day. Section 1.040, RSMo 1978. A six-calendar-month period beginning on October 4, 1983, ends April 3, 1984, which is the next general municipal election day. Accordingly, because October 3, 1983, is not counted, this vacancy occurred within a six month period of a municipal election. The vacancy in the office of alderman, which you describe, should be filled in the manner prescribed by ordinance until the people choose an alderman to fill the vacancy at the municipal election. Section 79.280, RSMo Supp. 1983.

Yours very truly,



JOHN ASHCROFT
Attorney General

Enclosure

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

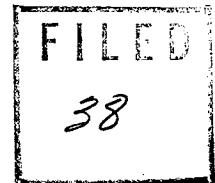
(314) 751-3321

August 1, 1984

DIRECT DIAL:

OPINION LETTER NO. 38-84

Paula V. Smith
Director
Department of Labor and Industrial Relations
Post Office Box 59
Jefferson City, Missouri 65102



Dear Ms. Smith:

This letter is in response to your question asking:

What is the status of the Department of Labor and specifically the Division of Labor Standards in regard to the responsibility for enforcement of Chapter 291 and 292 -RSMo 1978.

You state in your opinion request that:

Since reorganization in 1974 the Division has not had sufficient appropriation to hire enough inspectors to carry out the requirements of Chapter 292. Occasionally requests are received requesting an investigation of a specific work place. In addition, lawyers handling claims of employees will request the findings of the Division investigation.

Chapters 291 and 292, RSMo 1978,¹ impose certain duties on the Division of Industrial Inspection and the Inspection Section,²

¹All statutory references are to RSMo 1978, unless otherwise indicated.

²Section 286.005, RSMo Supp. 1983, transfers the duties of the Division of Industrial Inspection to the Inspection Section. The organization chart for the Department of Labor and Industrial Relations does not show an Inspection Section. Departmental Plan for the Department of Labor and Industrial Relations, App. C(1), RSMo Supp. 1983. We assume for purposes of this opinion that the Inspection Section is subsumed within the Division of Labor Standards.

Paula V. Smith

e.g., making inspections of certain business enterprises, Sections 291.060.2, 292.280, and 292.540, making investigations of serious accidents, Section 291.140, ordering businesses to comply with health and safety standards, Section 292.180, and enforcing health and safety standards, Sections 292.410, 292.520, and 292.560.

Your opinion request indicates that the Inspection Section is not able to perform these statutory duties because the General Assembly has failed to appropriate the funds necessary to perform these duties. We assume that the General Assembly has been made aware of the situation.

The organic law of Missouri prohibits the withdrawal of money from the state treasury, except pursuant to an appropriation. Article III, Section 36, and Article IV, Section 28, Missouri Constitution. Once the unencumbered balance of all applicable appropriations have been expended, money for such purpose may not be ordered out of the state treasury by any authority of the State of Missouri. State ex rel. Gibson v. State, 540 S.W.2d 17, 18 (Mo.Banc 1976), cert. denied, 430 U.S. 930 (1977).

I.

The Impossibility Defense

In Consolidated Apartment House Co. v. Mayor and City Council of Baltimore, 131 Md. 523, 102 A. 920 (1917), a landowner sued the defendant city officers to recover damages for the city's failure to remove ashes and household refuse from the landowner's premises. Under the City of Baltimore's charter, the mayor, city council, and street commissioner had the duty to clean streets of refuse. The defendants constituting the board of estimates issued an order to the street commissioner to cease removing ashes and household refuse from dwelling houses of more than four stories or having an elevator. The landowner alleged that in each of the fiscal years 1913, 1914, and 1915, unexpended amounts of the city's "street cleaning" appropriations were returned to the city's general revenue fund.

The court applied the rule that before one may find a public officer liable for an omission or failure to perform a duty imposed by law, the plaintiff must show, inter alia, that the public officer has the ability with the resources furnished him to perform the duty. Because the landowner had not alleged that the unexpended balances of the street cleaning appropriations returned to the city's general revenue fund for the fiscal years 1913, 1914, and 1915, were sufficient to remove ashes and household refuse from dwellings with more than four stories or with elevators, the court dismissed the case as to the street commissioner. However, the court held that the board of estimates in issuing the order to the street commissioner to refuse to remove ashes and household refuse from dwellings with more

Paula V. Smith

than four stories or with elevators, were directing the street commissioner to violate the city charter. This being an affirmative act on the part of the board of estimates, the members of the board of estimates might be liable.

The lessons of the Consolidated Apartment House Co. case are two-fold: (1) The insufficiency of appropriations creates the valid defense of impossibility of performance; and (2) no administrative orders, rules, regulations, or policies may positively direct agency employees not to enforce or comply with the law. This means, of course, that the priorities of the agency may be established within the limits set by the General Assembly in its appropriation acts, the Governor in his budget, and the dictates of reason, and if a particular program exhausts the budgeted funds available for that purpose, the agency is excused from the performance of that program, even if that program or duty is imposed by law; however, the executive in charge may not issue directives to subordinates that positively direct that the law be violated or ignored.

II.

Sovereign and Official Immunity

Section 537.600, RSMo 1978, states:

Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:

(1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles within the course of their employment;

(2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an

Paula V. Smith

employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

In relevant part, this statute reinstates the law of sovereign immunity as it existed prior to the decision in Jones v. State Highway Commission, 557 S.W.2d 225 (Mo.Banc 1977). The law prior to Jones was that the state was immune from liability. Accordingly, the state is immune from liability for the failure to perform duties under Chapters 291 and 292.

Missouri law recognizes an official immunity that clothes the discretionary functions of public officials from liability, but makes public officials liable for torts committed during the course of their ministerial duties. Jackson v. Wilson, 581 S.W.2d 39, 42-43 (Mo.App. 1979). Although the performance of a duty imposed by law might generally be considered a ministerial duty, the budgeting decisions establishing the funding levels of various agency programs are discretionary and are shielded from liability by the official immunity doctrine.

Accordingly, we conclude that the Department of Labor and Industrial Relations has no responsibility to, or liability for failure to, perform the duties imposed by Chapters 291 and 292, when the appropriations for the enforcement of these statutes have been exhausted.

Very truly yours,

A handwritten signature in black ink that reads "John Ashcroft". The signature is written in a cursive, slightly stylized font.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

February 16, 1984

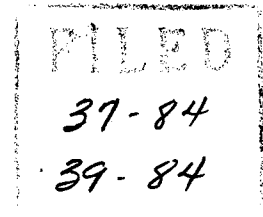
DIRECT DIAL:

OPINION LETTER NOS. 37-84 and 39-84

The Honorable Harriett Woods
Senator, District 13
State Capitol Building, Room 329
Jefferson City, Missouri 65101

and

The Honorable E. J. Cantrell
Representative, District 82
State Capitol Building, Room 300
Jefferson City, Missouri 65101



Dear Senator Woods and Representative Cantrell:

This is in response to your requests for opinions, numbered 39-84 and 37-84, respectively.

Opinion request number 39-84 (Woods) asks:

A portion of section 79.280, RSMo Supp. 1982, deals with filling a vacancy in the office of alderman in fourth class cities in St. Louis County. If the vacancy occurs "within six months of a municipal election," it is filled in the manner prescribed by ordinance. If it does not occur within six months of a municipal election, a special election is to be held to fill the vacancy.

My question is as follows:

If such an aldermanic vacancy occurs, to the date, exactly six months prior to a municipal election, is the vacancy filled by a special election or is it filled as prescribed by local ordinance?

The Honorable Harriett Woods and
The Honorable E. J. Cantrell

Opinion request number 37-84 (Cantrell) asks:

May a Fourth Class City in the County of St. Louis provide by ordinance to fill a vacancy on its board of aldermen by special election when the vacancy occurs within six months of a regular election (see Section 79.280 RSMo).

These opinion requests indicate that an alderman of Venita Park, Missouri, a fourth-class city located in St. Louis County, was elected to a two-year term of office, beginning in April, 1983, and ending in April, 1985. This alderman died on October 3, 1983. You also inform us that the terms of the Board of Aldermen of Venita Park are staggered pursuant to Section 79.060, RSMo 1978.¹ Therefore, some of the members of the Board of Aldermen of Venita Park will be up for election on April 3, 1984, the next municipal election day. See Section 115.121.3, RSMo 1978.

In Opinion No. 24, Schechter, 1965, copy enclosed, an alderman of the City of Overland was elected to office in April, 1964, for a term of two years. This alderman died on October 7, 1964. The terms of the members of the Board of Aldermen of Overland Park had staggered terms. The next municipal election at which members of the board of aldermen were elected was April 6, 1965.

Relying on City of Kirkwood v. Allen, 138 Mo. App. 478 (1909), this office concluded in Opinion No. 24, supra, that the "municipal election" to which Section 79.280 refers is the next general municipal election, despite the fact that there was approximately one and one-half years left to the unexpired term of the office vacated. Thus, pursuant to Opinion No. 24, supra, the vacancy in the Board of Aldermen must be filled at the next general election.

Following our 1965 opinion, the remaining issue for resolution in this opinion is whether the vacancy occurring on October 3, 1983, occurred within six months of the next general municipal election, which is to occur on April 3, 1984. Our answer will provide direction as to how the city must fill the vacancy--either by special election or by ordinance--until the people select an alderman at the next general municipal election.

¹There appears to be a conflict between Section 79.030, RSMo 1978, which authorizes municipal elections for all elective officers every two years, and Section 79.060, RSMo 1978, which appears to authorize staggered terms for members of the board of aldermen and annual elections for aldermen. For purposes of this opinion, we assume that Section 79.060, RSMo 1978, being the more specific statute, governs over Section 79.030, RSMo 1978.

The Honorable Harriett Woods and
The Honorable E. J. Cantrell

Section 1.020.1(6), RSMo 1978, states:

1. As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

. . . .

(6) "Month" and "year". "Month" means a calendar month, . . .; [Emphasis in original.]

Section 1.040, RSMo 1978, states:

The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday it shall be excluded.²

In re Lynch's Estate, 254 P.2d 454, 454-455 (Utah 1953), states:

One month is a calendar month
Such a month commences at the beginning of the day of the month on which it starts and ends at the expiration of the day before the same day of the next month. Thus a month which starts with the beginning of the first day of a calendar month would end at the end of the last day of such month, and not at the last end of the first day of the next month. If the month in question commenced on a day other than the first day of such month, such as at the beginning of the 23rd day of such month, it would end at the expiration of the 22nd day of the next month and not at the expiration of the 23rd day of the next month, which would be the beginning of another month. In the present case we exclude from our calculation the day of the act or event after

²The last sentence of Section 1.040, RSMo 1978, should be compared with Rule 44.01, which excludes the last day if it is a Saturday, Sunday or a legal holiday. Section 9.010, RSMo 1978, declares any general primary election day and any general state election day to be legal holidays. Primary election days occur in August, general election days occur in November, while municipal election days occur in April. Section 115.121, RSMo 1978. Therefore, municipal election days are not legal holidays.

The Honorable Harriett Woods and
The Honorable E. J. Cantrell

which the designated period of time begins to run, which is November 22, the day on which the motion was overruled, and start counting from the beginning of the 23rd day of that month; from that time one month would end at the expiration of the 22nd day of December, or just before the 23rd commenced, which marked the beginning of another month.

See also Needham v. Moore, 292 S.W.2d 720 (Tenn. 1956).

Applying these rules to the instant factual situation, we exclude October 3, 1983, as the first day. Section 1.040, RSMo 1978. A six-calendar-month period beginning on October 4, 1983, ends April 3, 1984, which is the next general municipal election day. Accordingly, because October 3, 1983, is not counted, this vacancy occurred within a six month period of a municipal election. The vacancy in the office of alderman, which you describe, should be filled in the manner prescribed by ordinance until the people choose an alderman to fill the vacancy at the municipal election. Section 79.280, RSMo Supp. 1983.

Yours very truly,



JOHN ASHCROFT
Attorney General

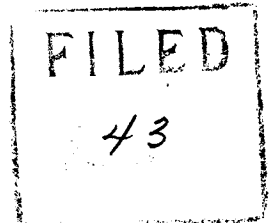
Enclosure

CITY JUDGE: For the purposes of Sections
CITIES, TOWNS, AND VILLAGES: 105.300, et seq., RSMo Supp.
SOCIAL SECURITY: 1983, providing for social
security tax reporting a municipal judge selected pursuant to Section 479.020, RSMo 1978, is an employee of the municipality. Further, it would not be possible for a municipality to provide for municipal judge services on a contractual basis in a manner as to exempt the municipality from treating such person as an employee for social security reporting purposes.

June 20, 1984

OPINION NO. 43-84
(CORRECTED)

Mr. John A. Pelzer
Commissioner of Administration
Office of Administration
Post Office Box 809
Jefferson City, Missouri 65102



Dear Commissioner Pelzer:

This is in response to your request for an opinion asking the following question:

For the purpose of administering the Social Security Agreement under Sections 105.300 to 105.440, RSMo, is an individual, selected to the position of Municipal Judge in accordance with Section 479.020, RSMo. an "employee" for social security reporting purposes as defined in Section 105.300(2). Additionally, would it be possible for a municipality to provide for a Municipal Judge or Municipal Judge services in a manner (see attached contract agreement) as to exempt the municipality from treating such person as an employee for social security reporting purposes under Sections 105.300 to 105.440, RSMo.

After reviewing the materials which you have forwarded with your request, it appears that a number of cities are selecting municipal judges by ordinance to provide municipal judge services on a contractual basis.

Section 479.020, RSMo 1978, provides in pertinent part for the selection of municipal judges as follows:

Mr. John A. Pelzer

1. Any city, town or village, including those operating under a constitutional or special charter, may, and cities with a population of four hundred thousand or more shall, provide by ordinance or charter for the selection, tenure and compensation of a municipal judge or judges consistent with the provisions of this chapter who shall have original jurisdiction to hear and determine all violations against the ordinances of the municipality. The method of selection of municipal judges shall be provided by charter or ordinance. Each municipal judge shall be selected for a term of not less than two years as provided by charter or ordinance.

For the purpose of the social security provisions, Section 105.300(2), RSMo Supp. 1983, defines "employee" as follows:

"Employee", elective or appointive officers and employees of the state, including members of the general assembly, and elective or appointive officers and employees of any political subdivision of the state, including county officers remunerated wholly by fees from sources other than county funds, or any instrumentality of either the state or such political subdivisions; and employees of a group of two or more political subdivisions of the state organized to perform common functions or services;

In light of these statutes, it is apparent that a municipal judge selected pursuant to Section 479.020 is an employee for social security purposes under the definition of employee in Section 105.300. Additionally, we conclude that it would not be possible for a city to provide for municipal judge services on a contractual basis in a manner as to exempt the municipality from the social security reporting provisions of Sections 105.300, et seq., RSMo Supp. 1983.

A similar situation was considered in Opinion No. 3, Bradford, April 3, 1980, concerning the position of city attorney. There, we concluded that the only time a city attorney, appointed by ordinance by a city, town, or village, is not an employee for social security reporting purposes is when the attorney is hired to represent the municipality in any suit or action at law or in equity brought against the municipality. Thus, an attorney may be hired as an independent contractor to handle a particular action involving the municipality. It would not be possible, however, for a municipality to have an independent contractor

Mr. John A. Pelzer

relationship with a municipal judge for social security reporting purposes.

The primary impediment to a municipality providing municipal judge services on a contractual basis is Section 479.020.1, which provides that each "municipal judge shall be selected for a term of not less than two years as provided by charter or ordinance." This makes it impossible for a municipality to provide for municipal judge services on a case-by-case basis.

CONCLUSION

It is the opinion of this office that for the purposes of Sections 105.300, et seq., RSMo Supp. 1983, providing for social security tax reporting a municipal judge selected pursuant to Section 479.020, RSMo 1978, is an employee of the municipality. Further, it would not be possible for a municipality to provide for municipal judge services on a contractual basis in a manner as to exempt the municipality from treating such person as an employee for social security reporting purposes.

Very truly yours,

A handwritten signature in black ink that reads "John Ashcroft". The signature is written in a cursive, slightly stylized font.

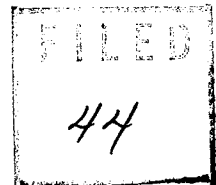
JOHN ASHCROFT
Attorney General

ELECTION EXPENSES: Public water supply districts
ELECTIONS: organized under Sections 247.010 to
WATER SUPPLY DISTRICTS: 247.220, RSMo 1978, and Supp. 1983,
are "special districts", under the
definition of that term in Section 115.013(24), RSMo Supp. 1983,
and must share election costs pursuant to Section 115.065, RSMo
Supp. 1983, and the words "all costs" in Section 115.065.1 and 2,
RSMo Supp. 1983, should be read as "all proportional costs" as
defined in Section 115.065.4, RSMo Supp. 1983. Election author-
ities may not allocate the fixed costs of the election authority
among special districts or political subdivisions which present
questions or candidates in any election, pursuant to section
115.065, RSMo Supp. 1983.

April 16, 1984

OPINION NO. 44-84

The Honorable Roger B. Wilson
Senator, District 19
State Capitol Building, Room 424
Jefferson City, Missouri 65101



Dear Senator Wilson:

This is in response to the following question:

Are public water supply districts created pursuant to section 247.020, RSMo 1978, and presently operating pursuant to sections 247.010 - 247.220, RSMo [hereinafter sometimes referred to as "public water supply districts"] required by the provisions of section 115.060, RSMo, 1978 [sic] to share proportionally the costs of elections?

The facts stated in support of your opinion request are as follows:

The Honorable Roger B. Wilson

The public water supply districts in my senatorial district have been assessed election costs which include salaries and other expenses. Although it is clear from section 115.065, RSMo Supp. 1983, that such costs are not to be assessed by the election authority, the water districts have to pay under the previous statute, 115.065, RSMo Supp. 1982.

In essence, your question asks us to determine the meaning of the phrase "all costs of the election" as it appears in Section 115.065, RSMo Supp. 1983. We must assume from your question that you refer to a public water supply district which presents a question or candidate to the voters on the same election day as either the state or some other special district or political subdivision presents a question or candidate. You do not, we assume, present a factual circumstance governed by Section 115.063, RSMo Supp. 1983, which requires a special district or political subdivision presenting the only questions or candidates on a given election to pay "all costs of the election."

Section 115.013(24), RSMo Supp. 1983, states:

"Special district" means any school district, water district, fire protection district, hospital district, health center, nursing district, or other districts with tax authority, or other district formed under the laws of Missouri to provide limited, specific services;

Public water supply districts possess the power to tax. Sections 247.050(11) and 247.120, RSMo 1978. Public water supply districts are "special districts," under the definition of that phrase found in Section 115.013(24).

The phrase "proportional costs" appears only in Section 115.065.4. It is defined as follows:

[O]nly those costs that require an additional out-of-pocket expense by the election authority in conducting an election. It does not include the salaries of full-time employees of the election authority or any indirect expenses for employees such as expenses for workers' compensation, health insurance or other similar expenses.

The Honorable Roger B. Wilson

The clear language of Section 115.065.4 means that only the variable^{1/} costs of conducting an election are to be borne by the special districts or political subdivisions presenting questions or candidates.

Section 115.065.1 and 115.065.2 each contain the following phrase "all costs of the election shall be paid proportionally . . .". The phrase "proportional costs" does not appear.

Section 115.065.3 uses the phrase "proportional election costs". The phrase "proportional costs" is not employed in Section 115.065.3.

It is presumed that legislative action is intended to have some substantive effect. State ex inf. Ashcroft ex rel. Bell v. City of Fulton, 642 S.W.2d 617 (Mo. banc 1982). Were we to read the statute literally, the addition of subsection 4 to Section 115.065 would be meaningless since the phrase defined is not used in the statutes. To avoid a meaningless result, we read the words "all costs" in subsections 1 and 2 of Section 115.065 to mean "all proportional costs". Accordingly, election authorities may not invoke Section 115.065 for the purpose of allocating the salaries of full-time employees in the manner you describe in your question.

In order to alleviate any confusion, we go further than your question requires us to go. We note that the General Assembly did not use the phrase "the cost of all elections" in Section 115.065. In our view, the use of that phrase would have authorized the election authorities to allocate its total costs among all special districts or political subdivisions presenting a question or candidate to the voters on a given election day. Irrespective of the definition of "proportional costs" contained in Section 115.065.4, it is our view that election authorities may not assess special districts or political subdivisions a share of their fixed costs of operation.

1/

The total cost of operating an election authority is comprised of the fixed costs and the variable costs. Fixed costs represent the total expense of operating the election authority even if there are no elections. Fixed costs include, but are not limited to building rental and maintenance, salaries, etc. Variable costs are all costs not included in fixed costs. See Samuelson, Economics, 443 (8th Edition, 1970).

In our view, "proportional costs" as used in Section 115.065.4 are essentially the variable costs of the election authority, i.e., those additional expenses incurred by an election authority as a result of conducting an election.

The Honorable Roger B. Wilson

CONCLUSION

It is the opinion of this office that:

(1) Public water supply districts organized under Sections 247.010 to 247.220, RSMo 1978, and Supp. 1983, are "special districts", under the definition of that term in Section 115.013 (24), RSMo Supp. 1983, and must share election costs pursuant to Section 115.065, RSMo Supp. 1983, and

(2) The words "all costs" in Section 115.065.1 and 2, RSMo Supp. 1983, should be read as "all proportional costs" as defined in Section 115.065.4, RSMo Supp. 1983. Election authorities may not allocate the salaries of full-time employees of the election authority among special districts or political subdivisions which present questions or candidates in any election, pursuant to section 115.065, RSMo Supp. 1983.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

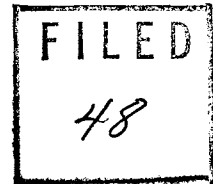
JOHN ASHCROFT
Attorney General

ASSESSMENT BOOKS: A parcel or locator number may
ASSESSORS: incorporate by reference an
INCORPORATION BY REFERENCE: accurate land description in
LAND DESCRIPTIONS: the county recorder of deeds'
STATE TAX COMMISSION: office, and such constitutes
an accurate description of the
land for purposes of Section 137.225.2, RSMo 1978.

July 26, 1984

OPINION NO. 48-84

The Honorable Samuel C. Jones, Chairman
State Tax Commission
623 East Capitol
P. O. Box 146
Jefferson City, Missouri 65102



Dear Mr. Jones:

This letter is written in response to your question asking:

May assessing officials incorporate land
descriptions in the tax books from other
public records through the use of locator
or parcel cross-reference numbers?

We understand that pursuant to Section 138.380(5), RSMo 1978, the State Tax Commission wishes to prescribe the form of the Real Estate Book, Section 137.225, RSMo 1978. A copy of the proposed form is attached hereto and marked "Appendix A." As can be determined by an examination of this form, parcel numbers are used in lieu of a formal legal description of the land.

As we view the question asked, it presents the issue of whether a parcel number is "an accurate description of the land by the smallest legal subdivisions, or by smaller parts, lots or parcels, when sections and the subdivisions thereof are subdivided into parts, lots or parcels;". Section 137.225.2, RSMo 1978.

In Costello v. City of St. Louis, 262 S.W.2d 591 (Mo. 1953), overruled on other grounds, Powell v. County of St. Louis, 559 S.W.2d 189 (Mo. banc 1977), the court held that the general rule that a land description is adequate if the description is sufficiently definite and certain to enable one reasonably skilled in such matters to locate the land was modified by Sections 140.030, 140.170, and 140.530, RSMo 1949, which required a "full" description of the land. "The description must be accurate, correct and definite even though abbreviations are authorized." 262 S.W.2d at 595.

The Honorable Samuel C. Jones

In Lueck v. Russell, 632 S.W.2d 40 (Mo. App. 1982), the court indicated that a land description in a tax deed may be made sufficient by reference to a previously recorded instrument which includes a sufficient description. 632 S.W.2d at 42-43. The court specifically indicated that Costello does not prevent a "full" description from being incorporated by reference. 632 S.W.2d at 43. Leuck sanctions the use of incorporation by reference as a method of providing a "full" land description. See also Mason v. Whyte, 660 S.W.2d 383, 386-387 (Mo.App. 1983) (description does not have to enable one to locate the land described by reference to the deed alone).

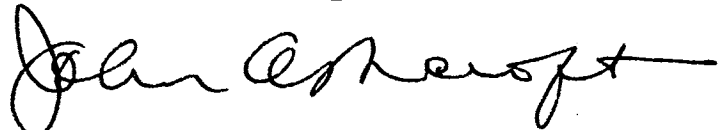
Costello defines a "full" description as "accurate, correct and definite" 262 S.W.2d at 595. Section 137.225.2, RSMo 1978, requires an accurate description, a less than full description as set forth in Costello. Since the use of incorporation by reference as a method of providing a "full" land description is authorized in Leuck, it follows that incorporation by reference can be used as a method of providing an "accurate" land description.

Although the land description in Leuck made a specific reference to a book and page number in the county recorder of deeds' office, we note that, with the assistance of the assessor's office, one may translate the parcel or locator number to a specific book and page reference in the county recorder of deeds' records.

CONCLUSION

It is the opinion of this office that a parcel or locator number may incorporate by reference an accurate land description in the county recorder of deeds' office, and that such constitutes an accurate description of the land for purposes of Section 137.225.2, RSMo 1978.

Yours very truly,



JOHN ASHCROFT
Attorney General

Enclosure
Appendix A

REAL ESTATE BOOK

[illegible]

Appendix A

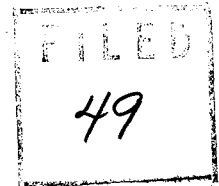
LANDLORD AND TENANT:
SECURITY DEPOSIT:

The provisions of House
Bill 175 (82nd General
Assembly, First Regular
Session), Section 535.300, RSMo Supp. 1983, are not applicable to
non-dwelling unit rental property.

April 9, 1984

OPINION NO. 49-84

The Honorable Jerry Cox
Representative, District 20
State Capitol Building, Room 115J
Jefferson City, Missouri 65101



Dear Representative Cox:

This is in response to your request for an opinion as follows:

On H.B. 175, the landlord-tenant bill from last year, I would like to request your opinion as to whether [it] applies to commercial as well as residential property.

It is our understanding that your opinion does not concern the entirety of House Bill 175 (82nd General Assembly, First Regular Session) but only Section 1 of House Bill 175 (now found at Section 535.300, RSMo Supp. 1983). Therefore, this opinion will be limited to Section 535.300 and should not be interpreted as applicable to any section other than Section 535.300.

Section 535.300 provides that a landlord may not demand or receive a security deposit from any tenant in excess of two months' rent. In addition, the section provides that the landlord must return the full amount of security deposit within thirty days after the termination of the tenancy or furnish the tenant a written, itemized statement of damages for which the security deposit or any part of the security deposit is withheld from the tenant. The legislature has also provided that the landlord may withhold from the security deposit only amounts that are reasonably necessary to (1) remedy a tenant's default in the payment of rent, (2) restore the "dwelling unit" to its condition at the beginning of the tenancy, with an exception for ordinary wear and tear, or (3) compensate the landlord for his damage when a tenant fails to provide adequate notice of his intent to terminate the tenancy.

The Honorable Jerry Cox

Section 535.300.7 defines a security deposit as follows:

[A]ny deposit of money or property, however denominated, which is furnished by a tenant to a landlord to secure the performance of any part of the rental agreement, including damages to the dwelling unit. This term does not include any money or property denominated as a deposit for a pet on the premises. [Emphasis added.]

In rendering this opinion, it is our mission to interpret the intent of the General Assembly. City of Willow Springs v. Missouri State Library, 596 S.W.2d 441 (Mo. banc 1980). Where a statute is ambiguous, it is proper to consider its history, the surrounding circumstances, and the ends to be accomplished by the legislation. Glanville v. Hickory County Reorganized School District No. 1, 637 S.W.2d 328 (Mo.App. 1982). We are to assign the words used by the General Assembly in the statute their plain and ordinary meaning. Springfield Park Central Hospital v. Director of Revenue, 643 S.W.2d 599 (Mo. banc 1983).

We find no express exception in Section 535.300 for commercial property.^{1/} However, the language employed by the General Assembly refers to "the dwelling unit" four separate times. Sections 535.300.3(2), 535.300.4, and 535.300.7. The statutory language makes no reference to any type of rental property other than "the dwelling unit".

Our review of Section 535.300 leads us to the conclusion that the mischief which the General Assembly wished to remedy in its passage of the law is the ability of residential landlords to require excessive security deposits from tenants. Because non-

1/

Section 441.500, RSMo 1978, defines a dwelling unit as follows:

"Dwelling Unit", every premise or part thereof occupied, used or held out for use and occupancy as a place of abode for human beings; . . .

While we are not bound by the Section 441.500 definition, we believe that this definition of dwelling unit is consistent with that intended by the General Assembly in Section 535.300 and adopt it for purposes of this opinion. Thus, despite your question's dichotomy between commercial and residential property, we choose in this opinion to accept a different distinction. Hence, we shall refer to property as being either dwelling or non-dwelling property.

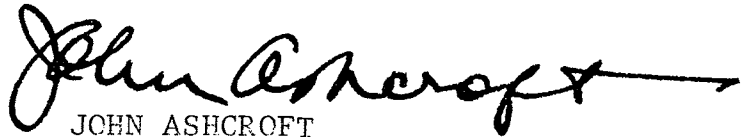
The Honorable Jerry Cox

residential tenants have greater freedom of choice in obtaining a leasehold for the transaction of their business, we believe the General Assembly did not intend to include non-dwelling unit property within the purview of Section 535.300. The repeated reference to "the dwelling unit" throughout the statute without reference to any other form of rental property, is, in our view, an indication of the General Assembly's intent to limit the applicability of Section 535.300 to residential rental property.

CONCLUSION

Therefore, it is the opinion of this office that the provisions of House Bill 175 (82nd General Assembly, First Regular Session), Section 535.300, RSMo Supp. 1983, are not applicable to non-dwelling unit rental property.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

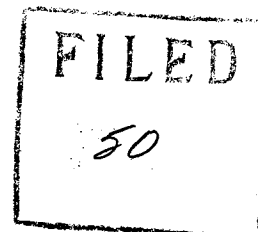
(314) 751-3321

DIRECT DIAL:

April 30, 1984

OPINION LETTER NO. 50-84

Ed Daniel, Director
Department of Public Safety
8th Floor, Truman Office Building
Jefferson City, Missouri 65101



Dear Mr. Daniel:

This opinion is in response to your question asking:

(The Division of Veterans Affairs, Department of Public Safety, occupies a wing of the State Chest Hospital, Division of Health, Department of Social Services at Mount Vernon and pays the Chest Hospital for goods and services provided by the Hospital.)

Question: Does the State Chest Hospital administration or parent organizations, Division of Health and Department of Social Services, have the authority to bar veterans nursing home personnel from using the state-owned housing on the hospital grounds and/or to determine the amount of rent which should be paid by those employees; or should the Division of Veterans Affairs be allotted a proportionate share of the dwellings for use by its "on call" employees?

The Division of Veterans' Affairs was transferred from the Department of Social Services to the Department of Public Safety, Office of Adjutant General. Reorganization Plan No. 3 of 1981, App. A, RSMo Supp. 1983. See Section 1.13 of the Omnibus State Reorganization Act of 1974, App. B, RSMo Supp. 1983. The Missouri State Chest Hospital at Mount Vernon is under the control and administration of the Division of Health, Department of Social Services. See Sections 192.010 and 199.010, RSMo 1978.

Ed Daniel

As we understand the facts, since April, 1983, the Division of Veterans' Affairs has occupied a wing of the Missouri State Chest Hospital at Mount Vernon. This wing is operated as an "annex" to the Missouri Veterans' Home at Saint James, but Sections 42.100 to 42.125, RSMo 1978, are not applicable. The staff of this annex are employed pursuant to Sections 42.060 and 42.070, RSMo 1978. Section 42.070, RSMo 1978, makes employees of the Division of Veterans' Affairs subject to the State Personnel Law, Chapter 36, RSMo 1978 and Supp. 1983. Section 36.030.1(9), RSMo Supp. 1983, exempts from the State Personnel Law the resident administrative head of each state medical, penal and correctional institution, upon the approval of the Personnel Board. We assume, for purposes of this opinion, that the Personnel Board has not approved the exemption of the resident administrative head of the "annex" at Mount Vernon and that such resident administrative head is subject to the State Personnel Law.

The Division of Veterans' Affairs has entered into a cost-sharing and cooperation contract/lease with the Division of Health regarding the skills, resources, and physical plant of both parties. We have examined this agreement and find no provision purporting to transfer control of living quarters at Mount Vernon from the Division of Health to the Division of Veterans' Affairs.

Section 192.010, RSMo 1978, states:

The division of health within the department of social services shall have such duties and powers as are assigned by law or by the department. The division of health shall also have control and administration over the Missouri state chest hospital at Mt. Vernon as provided by law. . . . [Emphasis added.]

Section 199.020, RSMo 1978, states:

The following officers and their families shall, with the permission of the division of health, reside in the institution: Superintendent, assistant physicians, secretary, steward and matron; provided, that no child of any officer twenty-one years of age or older shall reside at the institution without the consent of the division of health, and then only by paying full compensation for board and lodging. [Emphasis added.]

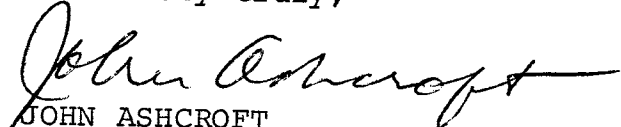
See also Section 191.160, RSMo Supp. 1983.

These statutes clearly place the control of the Missouri State Chest Hospital at Mount Vernon with the Division of Health.

Ed Daniel

In Opinion Letter No. 41, Godar, 1975, copy enclosed, this office indicated that "merit system" employees may receive board and living quarters from the state if the director of the department in control of these facilities determines that such is for the good of the state and necessary for the proper performance of duties, even if no statute specifically authorizes the provision of living quarters to these employees. Here, the Division of Health is vested with the control of the facilities. Therefore, the Division of Health may bar veterans' nursing home personnel from using state-owned housing on Missouri State Chest Hospital grounds and may, depending upon the circumstances, set the rent for the use of such facilities.

Yours very truly,


JOHN ASHCROFT
Attorney General

Enclosure:

Opinion Letter No. 41, Godar, 1975

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

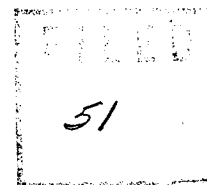
(314) 751-3321

DIRECT DIAL:

February 8, 1984

OPINION LETTER NO. 51-84
(Amended Copy)

The Honorable Nelson B. Tinnin
Senator, District 25
State Capitol Building, Room 333
Jefferson City, Missouri 65101



Dear Senator Tinnin:

This letter is in response to your question asking:

Does Missouri State law provide a mechanism for "deconsolidating" a school district? May a portion of a reorganized school district be severed, and recognized as a separate school district?

This question arose from the following facts, as stated in your opinion request:

Sometime during the 1950s, the Portageville School District, in New Madrid County, merged with five surrounding school districts to form the Portageville Reorganized District.

During 1968-1969, the Portageville Reorganized District merged with the New Madrid School District, to form the New Madrid R1 School District. At the time of this second merger, Portageville had a high school with complete curriculum. The reason Portageville joined with New Madrid was to qualify for a vocational school.

During the years since the second merger, many Portageville residents, including the mayor and former school board members, have become increasingly dissatisfied with what they see as a progressive dismantling of the Portageville School system. They have alleged that their high school no longer has the

The Honorable Nelson B. Tinnin

sufficient required units of instruction to grant diplomas; schools in Portageville are not funded equally to those in New Madrid; and in many other respects, the Portageville schools.

As a result, many Portageville residents would like to sever their connection with the New Madrid R-1 School district, and establish a district with boundaries similar to the Portageville Reorganized District prior to the 1968-1969 merger.

For purposes of this opinion letter, we assume that the New Madrid R-1 School District is a reorganized school district and is not a consolidated six-director school district as defined in Section 162.223, RSMo 1978.

Relying upon Hydesburg Common School Dist. of Ralls County v. Rensselaer Common School Dist. of Ralls County, 218 S.W.2d 833 (Mo. App. 1949), and State Ex inf. McGinnis ex rel. Kemble v. Consolidated School Dist. No. 3, Pike County, 277 Mo. 28, 209 S.W. 96 (banc 1919), in Opinion No. 89, Thomasson, April 7, 1954 (copy enclosed), this office concluded that when a school district is consolidated with one or more school districts, it loses its identity, is merged indistinguishably with the other district or districts, and thereby cannot be voted out of the consolidated school district. See also State ex inf. Conkling ex rel. Hendricks v. Sweaney, 270 Mo. 685, 195 S.W. 714 (banc 1917) (no procedure to divide consolidated districts). This rule applies to reorganized school districts such as the New Madrid R-1 School District. Spiking School Dist. No. 71, DeKalb County, et al. v. Purported "Enlarged School District R-II, DeKalb County, Missouri", 362 Mo. 848, 245 S.W.2d 13 (banc 1952). This office reached a similar conclusion in Opinion No. 10, Boone, November 15, 1956 (copy enclosed). The preexisting school districts are not restored by the dissolution of a consolidated reorganized district, nor is there statutory authority to divide consolidated six-director districts or reorganized school districts into smaller districts.

This office is aware of the recently enacted Section 162.171, RSMo Supp. 1983, which from time to time would permit a county court to submit to the State Board of Education plans for the reorganization of school districts in the county pursuant to Section 161.152, RSMo 1978. However, Section 162.171, supra, limits this authority to unreorganized districts and certain reorganized


The Honorable Nelson B. Tinnin

districts. The facts presented in your opinion request suggest that the New Madrid R-1 School District is not one of these reorganized districts.

The New Madrid R-1 School District may elect to be dissolved pursuant to the procedure set forth in Section 162.451, RSMo 1978. However, this would leave the school district an "unorganized" territory which by election or county court action would be assigned and annexed to an adjoining school district under the mandate of Section 162.071, RSMo Supp. 1983, and would not restore the former Portageville Reorganized School District.

From the foregoing, it would appear that there is no provision in Missouri law to permit a reorganized school district to "deconsolidate" without eliminating totally the legal existence of the original districts and that a reorganized school district may not be subdivided and the parts thereof recognized as separate school districts.

Very truly yours,


JOHN ASHCROFT
Attorney General

Enclosures

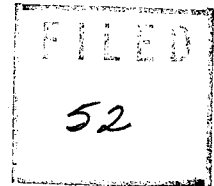
JUDGES:
ELECTIONS:
SECRETARY OF STATE:
CANDIDATES:

The Secretary of State may accept declarations of candidacy received by mail from circuit judges seeking retention pursuant to Article V, Section 25(c)(1), Missouri Constitution.

February 6, 1984

OPINION NO. 52-84

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion as follows:

May the Secretary of State accept declarations of candidacy of non-partisan judges elected or appointed under the provisions of Article V, Section 25 of the Missouri Constitution who file their declaration of candidacy for retention in office with the Secretary of State by mail, as opposed to in person?

Article V, Section 25(c)(1), Missouri Constitution, provides in part pertinent to your request:

Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 25(a)-(g) [of Article V] may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. . . . [Emphasis added]

Section 115.355.1, RSMo 1978, provides:

Except as provided in subsection 2 of this section and in section 115.377, each declaration of candidacy for nomination in a

The Honorable James C. Kirkpatrick

primary election shall be filed by the candidate in person in the office of the appropriate election official. [Emphasis added]

Sections 115.355.2 and 115.377, RSMo 1978, are not pertinent to your request.

In our Opinion No. 359, Kirkpatrick, 1970, this office opined that Section 120.345, RSMo 1969 (repealed), required judges seeking retention pursuant to the Missouri nonpartisan court plan to file their declaration of candidacy with the Secretary of State's office in person. Section 120.345 was repealed by the General Assembly in 1977 with the passage of the Comprehensive Election Act of 1977, Sections 115.001 to 115.641, RSMo. Section 120.345 did not contain the limiting phrase "in a primary election" which is found in section 115.355.1. In Opinion No. 359 we noted:

There is no intimation in the statute, . . .
that it applies only to primary elections.
Such section purports to apply to all candidates filing for the office of circuit judge.
. . . Id. at 2.

In rendering this opinion, we are required to seek the intent of the legislature when interpreting statutes and the intent of the people when interpreting the constitution. State v. Burnau, 642 S.W.2d 621 (Mo. banc 1982); Roberts v. McNary, 636 S.W.2d 332 (Mo. banc 1982). In so doing, we are to assign the words employed their plain, ordinary meaning. Roberts v. McNary, supra. The dictionary properly provides that meaning. Buechner v. Bond, 650 S.W.2d 611 (Mo. banc 1982).

Where a statute requires the performance of an act by a particular class of persons, it implies that it excludes from its effects all those not expressly mentioned. 82 C.J.S., Statutes, Section 333; Parvey v. Humane Society of Missouri, 343 S.W.2d 678 (Mo. App. 1961). Thus, we believe that the General Assembly's use of the words "in a primary election" in Section 115.355.1 bespeaks an intention that filing in person is required only for candidates who seek nomination in a primary election. Because the primary election takes place in August (Section 115.121 RSMo 1978), more than sixty days prior to the general election at which judges are to seek retention, and because judges seeking retention do not become political party nominees (Article V, Sections 25(c)(1), 25(c)(2), and 25(f), Missouri Constitution), it is not our view that judges seeking retention under the non-partisan court plan are candidates in a primary election, to whom Section 115.355.1 applies.

The Honorable James C. Kirkpatrick

We must yet determine if the Secretary of State has the authority to accept declarations of candidacy received in the mail. The word "file" as used in the constitutional provision earlier cited is defined in Webster's Third New International Dictionary (1965) as follows:

[T]o deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office.

In Labrier v. Anheuser Ford, Inc., 621 S.W.2d 51, 54 (Mo. banc 1981), our Supreme Court stated: "The filing is the actual delivery of the paper to the clerk. . . ." [citation omitted]." Said another way, a document is not filed until it is received by the appropriate official, here the Secretary of State.

When, as here, the law does not prescribe the manner in which the Secretary of State may accept the declaration of candidacy of a circuit judge seeking retention, we believe he may perform that duty in any manner consistent with the purposes of the law. 76 C.J.S, Officers, Sections 192-193, Bullock v. Calvert, 480 S.W.2d 367 (Tex. 1972). Therefore, we believe that the Secretary of State may accept declarations of candidacy mailed to his office by circuit judges seeking retention pursuant to Article V, Section 25(c)(1), Missouri Constitution.

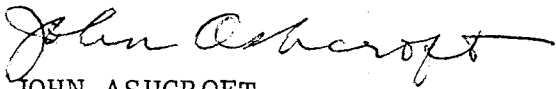
Because our Opinion No. 359, Kirkpatrick, 1970, is based upon a law now repealed, and because such opinion is inconsistent with this opinion, Opinion No. 359 is withdrawn.

CONCLUSION

It is the opinion of this office that the Secretary of State may accept declarations of candidacy received by mail from circuit judges seeking retention pursuant to Article V, Section 25(c)(1), Missouri Constitution.

The foregoing opinion, which I hereby approve, was prepared by my Deputy, Edward D. Robertson, Jr.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

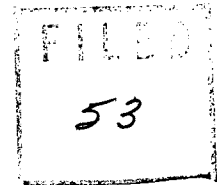
(314) 751-3321

DIRECT DIAL:

August 13, 1984

OPINION LETTER NO. 53-84

The Honorable Roger B. Wilson
Senator, District 19
State Capitol Building, Room 424
Jefferson City, Missouri 65101



Dear Senator Wilson:

This opinion is in response to your question asking:

Does the Cancer Commission have the power to issue a grant for cancer research to a private, not-for-profit Missouri corporation, who is affiliated with the State Cancer Center for research purposes, from funds which the general assembly has appropriated for the purpose of funding cancer detection and research grants through agencies affiliated with the State Cancer Center: (a) Does the Cancer Commission have the power to do the above for a private, not-for-profit Missouri corporation, who is not affiliated for cancer research purposes with the State Cancer Center; (b) If the Cancer Center does have the power to issue such grants as described above, may it issue a grant upon the Commission's opinion that the General Assembly's appropriation directed the Cancer Commission to issue such without competitive bidding, and to the not-for-profit Missouri corporation as a sole source recipient?

The question mentions an appropriation act that may purport to authorize such a grant. Appropriation acts may not contain substantive legislation. State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S.W. 338, 340 (Banc 1926); State ex rel. McKinley Pub. Co. v. Hackmann, 314 Mo. 33, 282 S.W. 1007, 1010-1011 (Banc 1926). Therefore, appropriation acts may not authorize the Cancer Commission to make the grants described.

The Honorable Roger B. Wilson

We have not been directed to, nor has independent research revealed, a statute purporting to authorize the Cancer Commission to make the grants described in the question. Accordingly, we must conclude that such grants are not authorized.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized font. The first name "John" is written with a large, looping 'J'. The last name "Ashcroft" is written with a large, looping 'A' and a long, sweeping tail that extends to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

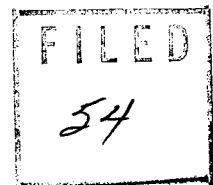
(314) 751-3321

DIRECT DIAL:

April 12, 1984

OPINION LETTER NO. 54-84

The Honorable James R. Strong
Senator, District 6
State Capitol Building, Room 417
Jefferson City, Missouri 65101



Dear Senator Strong:

This opinion is in response to your request asking:

Section 57.955 RSMo. Supp. 1983 states "in addition to all other legal costs in each civil suit . . . and all other proceedings of a civil nature filed in each circuit court and the divisions thereof, except the juvenile divisions, in a county there shall be assessed and collected . . . a sum of three dollars." These special costs are to fund the Sheriff's Retirement System.

- 1) Are municipal ordinance violations filed in the municipal division of the circuit courts "civil suits" as defined in Section 57.955? (See Attachment A)
- 2) Are municipal courts required to collect the special court costs for the Sheriff's Retirement System under Section 57.955?
- 3) If the response to question 2 is affirmative, when a municipal ordinance violation is appealed or certified to the Circuit Court from the Municipal Division to be heard de novo, are these costs to be collected again on the case?

Section 57.955.1, RSMo Supp. 1983, states:

The Honorable James R. Strong

After the effective date of the establishment of the system, in addition to all other legal costs in each civil suit, action, case and all other proceedings of a civil nature filed in each circuit court and the divisions thereof, except the juvenile divisions, in a county there shall be assessed and collected in the same manner as other civil court costs are collected a sum of three dollars and in all criminal cases a sum of two dollars, but no such costs shall be assessed when the costs are to be paid by the state for indigent defendants. The clerk, or other official responsible for collecting court costs in civil and criminal cases, shall collect such amounts and shall remit them monthly to the board for deposit in the sheriffs' retirement fund. The clerk, or other official, shall keep accurate records of the amounts collected for the sheriffs' retirement fund pursuant to this subsection and the records may be audited by the board of directors at any time. Moneys credited to the sheriffs' retirement fund shall be used only for the purposes provided for in sections 57.949 to 57.997 and for no other purpose. [Emphasis added.]

Municipal corporation courts have been abolished by the adoption of the unified court plan, C.C.S.S.J.R. 24, 1975-1976 Missouri Laws 803, 819 (adopted August 3, 1976, effective January 2, 1979), and the enactment of the Court Reform and Revision Act of 1978, H.B. 1634, 1978 Missouri Laws 696.

Article V, Section 27, Missouri Constitution, states in part:

Except as otherwise provided in this article, the effective date of this article shall be January 2, 1979.

* * *

2. All . . . municipal corporation courts shall continue to exist until the effective date of this article at which time said courts shall cease to exist. When such courts cease to exist:

* * *

The Honorable James R. Strong

d. The jurisdiction of municipal courts shall be transferred to the circuit court of the circuit in which such municipality or major geographical area thereof shall be located and, such courts shall become divisions of the circuit court. . . . [Emphasis added.]

Section 479.010, RSMo 1978, states:

Violations of municipal ordinances shall be tried only before divisions of the circuit court as hereinafter provided in this chapter. [Emphasis added and revisor's note omitted.]

Municipal ordinance violations are now tried only before divisions of the circuit courts. Section 57.955.1, RSMo Supp. 1983, applies to "each civil suit, action, case and all other proceedings of a civil nature filed in each circuit court and the divisions thereof, except the juvenile divisions, . . . and in all criminal cases" (Emphasis added.) For well over a hundred years, municipal ordinance violations have been regarded as actions that are quasi-criminal in nature but civil in form. City of Kansas City v. Clark, 68 Mo. 588, 590 (October Term, 1878). Municipal ordinance violations are not crimes. City of St. Louis v. Brune Management Co., 391 S.W.2d 943, 946 (Mo.App. 1965). Municipal ordinance violations are civil actions for the recovery of a penalty. City of Ava v. Yost, 375 S.W.2d 884, 886 (Mo.App. 1964). Accordingly, the answer to the first question presented is that a municipal ordinance violation case filed in the municipal division of a circuit court is an action of a civil nature. However, this does not necessarily mean that Section 57.955.1, RSMo Supp. 1983, imposes court costs in municipal division cases.

Subsections 1 and 2 of Section 479.260, RSMo Supp. 1983, state:

1. Municipalities by ordinance may provide for court costs in an amount not to exceed twelve dollars per case for each municipal ordinance violation case filed before a municipal judge, and in the event a defendant pleads guilty or is found guilty, the judge may assess costs against the defendant except in those cases where the defendant is found by the judge to be indigent and unable to pay the costs. The costs authorized in this subsection are in addition to service costs, witness fees and jail costs that may otherwise

The Honorable James R. Strong

be authorized to be assessed, but are in lieu of other court or judge costs or fees. Such costs shall be collected by the municipal clerk and disbursed as provided in subsection 1 of section 479.080.

2. In municipal ordinance violation cases which are filed before an associate circuit judge, court costs shall be assessed in the amount of fifteen dollars per case. In the event a defendant pleads guilty or is found guilty, the judge shall assess costs against the defendant except in those cases where the defendant is found by the judge to be indigent and unable to pay the costs. In the event a defendant is acquitted or the case is dismissed, the judge shall not assess costs against the municipality. The costs authorized in this subsection are in addition to service costs, witness fees and jail costs that may otherwise be authorized to be assessed, but are in lieu of other court costs. Such costs shall be collected by the division clerk or as provided by court rule and disbursed as provided in subsection 2 of section 479.080. [Emphasis added.]

Section 57.955.1, RSMo Supp. 1983, originated as Senate Bill No. 145, 82nd General Assembly, First Regular Session. Senate Bill No. 145 was incorporated into House Bill No. 81 by the Conference Committee that produced Conference Committee Substitute for House Bill No. 81, 1983 Missouri Legislative Service 1564, 1571 (Vernon's). The pertinent wording did not change anywhere along the legislative process. Section 479.260, RSMo Supp. 1983, originated as part of the Court Reform and Revision Act of 1978, H.B. 1634, 1978 Missouri Laws 696, 889.

Sections 57.955.1 and 479.260, RSMo Supp. 1983, appear to conflict. Statutes that appear to conflict should be harmonized together if at all possible; the ultimate guide being the intent of the General Assembly. Edwards v. St. Louis County, 429 S.W.2d 718, 721-722 (Mo.Banc 1968).

In Opinion No. 159, Cantrell, July 31, 1980, copy enclosed, this office observed an apparent conflict between Section 479.260, RSMo, and Section 590.140, RSMo, which specifically authorizes municipalities to impose court costs earmarked for the peace officers' standards and training (POST) program. We determined that

The Honorable James R. Strong

the General Assembly intended to bypass the Section 479.260 "in lieu of" language through the enactment of Section 590.140, RSMo, because (1) the POST costs were specifically earmarked and (2) specific and express authorization was given to municipalities to impose such costs.

In determining the legislative intent behind Section 57.955.1, we note that the General Assembly is currently considering House Committee Substitute for Senate Bill No. 704. This bill would specifically exempt the municipal divisions from Section 57.955.1. The fiscal note accompanying this bill (F.N. 2716-1; dated April 3, 1984) states:

The intent of this is to clarify the provisions of legislation enacted last year regarding the levy of court costs in municipal courts as they relate to the sheriffs retirement system and would have no effect on state or local funds.
[Emphasis added.]

See Section 21.510, RSMo 1978.

The fact that the fiscal note states that the exclusion of municipal divisions from Section 57.955.1, as is proposed by H.C.S. S.B. 704, would not affect state or local funds, shows that the General Assembly never originally intended to include municipal divisions in Section 57.955.1. Otherwise, the exclusion of municipal divisions would have some fiscal impact on public funds. Therefore, we conclude that the "in lieu of" language of Section 479.260, RSMo Supp. 1983, controls in this instance.

Accordingly, Section 57.955.1, RSMo Supp. 1983, does not impose court costs in cases filed in the municipal divisions of the circuit courts.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure:

Opinion No. 159, Cantrell, 7-31-80

Attorney General of Missouri

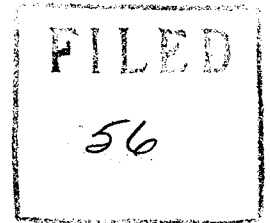
POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

March 22, 1984



OPINION LETTER NO. 56-84

Mr. David A. Baird
Nodaway County Prosecuting Attorney
Nodaway County Courthouse
Maryville, Missouri 64468

Dear Mr. Baird:

This is in response to your request for an opinion as to the appropriate time for holding another election under the capital improvements sales tax, Section 67.700, RSMo Supp. 1983, where the qualified voters of your county defeated an earlier attempt to impose such tax at the general election held November 8, 1983.

A proposal for a capital improvements sales tax can be submitted to the voters of a county pursuant to Sections 67.700 to 67.727, RSMo Supp. 1983, at any county or state general, primary or special election. If the majority of the votes cast by the qualified voters voting thereon are opposed to the proposal, subparagraph 2 of Section 67.700 provides that no new proposal can be submitted to the voters sooner than twelve months from the date of submission of the last proposal.

In your request, you state that a proposal under the capital improvements sales tax act was submitted to the voters of your county and rejected on November 8, 1983. The county court is now considering a new capital improvements sales tax proposal but concern has been raised as to whether such proposal can be submitted to the voters at the next general election, November 6, 1984.

Attached are two prior opinions from this office, Opinion No. 106, Clapper, January 25, 1971, and Opinion Letter Nos. 37-84 and 39-84, Woods, issued February 16, 1984, which we believe answer your question. The computation of time where the legislature had prescribed limitations in terms of months was the central theme of

Mr. David A. Baird

both opinions. Applying the rules set forth therein, November 8, 1983, would be excluded as the first day from which the ensuing twelve-month period is calculated. Each of the following calendar months would then begin on the ninth day of the month and end on the eighth day of the following month. Using this method of calculation, twelve months would elapse on November 8, 1984. Therefore, no election on the current capital improvements sales tax proposal of the county court could be held legally prior to November 8, 1984, only subsequent to that date.

Very truly yours,

A handwritten signature in black ink that reads "John Ashcroft". The signature is written in a cursive style with a horizontal line underlining the name.

JOHN ASHCROFT
Attorney General

Enclosures

ADMINISTRATIVE AGENCIES:
CITIES, TOWNS AND VILLAGES:
CONSTITUTIONAL CHARTER CITIES:
PUBLIC RECORDS:
SUNSHINE LAW:

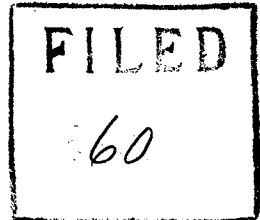
The Personnel Board of the City of Springfield is part of an administrative agency and, pursuant to Section 610.120, RSMo Supp. 1983, may have access to arrest

records closed under Section 610.105, RSMo Supp. 1983.

May 1, 1984

OPINION NO. 60-84

The Honorable Doug Harpool
Representative, District 134
State Capitol Building, Room 115C
Jefferson City, Missouri 65101



Dear Representative Harpool:

This opinion is in response to the following question:

Is a record that is closed under Section 610.105 RSMo. Cummm. Supp. 1983 available to the Personnel Board of the City of Springfield, Missouri, in an administrative hearing involving the dismissal of a City employee under provisions of Section 610.120 RSMo. Cummm. Supp. 1983, which makes closed records available to administrative agencies for the purpose of litigation?

The City of Springfield, Missouri, is a constitutional charter city. Section 6.3 of the City Charter creates an independent agency known as the Personnel Board. Section 6.6 of the City Charter authorizes the Personnel Board to approve merit system rules which are effective when approved by the City Council. Section 6.10 of the City Charter entitles employees under the classified service to be presented with written reasons for their discharge or reduction in rank or compensation and entitles such an employee to a public hearing before the Personnel Board. The Personnel Board then submits recommendations to the City Manager, who may reinstate the employee or restore the employee to his former rank or compensation, provided that the decision of the City Manager is supported by competent and substantial evidence and is reduced to writing, stating the reasons therefor. Section 6.4(4) of the City Charter empowers the Personnel Board to hear appeals from disciplinary actions. Pursuant to Section 6.6 of the City Charter, the Personnel Board and the City Council have adopted Section 13.6 of the Merit System Rules, which governs some of the procedural aspects at hearings before the Personnel Board.

The Honorable Doug Harpool

Section 13.6(d) of the Merit System Rules states:

(d) Board Shall Have Access to Pertinent Data:
In order to properly discharge its function in regard to the review of such disciplinary actions, the Board shall have access to any files, correspondence, memoranda, etc., which they feel might be pertinent to the case and shall have the right of questioning any officers or employees of the City whom they feel may be able to shed light on the circumstances involving the disciplinary action in question. . . .

See also Section 13.6(k) of the Merit System Rules (authorizing the Chairman of the Personnel Board to issue subpoenas).

Section 610.105, RSMo Supp. 1983, states:

If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records when such case is finally terminated except as provided in section 610.120.

Section 610.120, RSMo Supp. 1983, states:

Records required to be closed shall not be destroyed; they shall be inaccessible to the general public and to all persons other than the defendant except as provided in this section. They shall be available only to courts, administrative agencies, law enforcement agencies, and federal agencies for purposes of prosecution, litigation, sentencing, parole consideration and to federal agencies for such investigative purposes as authorized by law or presidential executive order. All records which are closed records shall be removed from the records of the courts, administrative agencies, and law enforcement agencies which are available to the public and shall be kept in separate records which are to be held confidential and, where possible, pages of the public record shall be retyped or rewritten omitting those portions of the record which deal with the defendant's case. If retyping or rewriting is not feasible

The Honorable Doug Harpool

because of the permanent nature of the record books, such record entries shall be blacked out and recopied in a confidential book. [Emphasis added.]

The legal issues presented are whether the Personnel Board is an "administrative agency" and whether the use of arrest records at hearings before the Personnel Board is for a "litigation" purpose under Section 610.120, RSMo Supp. 1983.

We note that Chapter 610, RSMo 1978 and Supp. 1983, applies to constitutional charter cities. Cohen v. Poelker, 520 S.W.2d 50, 53-54 (Mo.Banc 1975). We also note that the Administrative Procedure Act applies to municipal agencies. Hunter v. Madden, 565 S.W.2d 456, 458 (Mo.App. 1978). Looking to the Administrative Procedure Act, Section 536.010(1), RSMo 1978, one finds the following definition of the word "agency":

"Agency" means any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases; [Emphasis added in part.]

Section 536.010(2), RSMo 1978, defines the words "contested case" as follows:

"Contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing; [Emphasis in original.]

A dispute between a discharged "merit system" employee and the employing agency is a contested case, i.e., "litigation". Mills v. Federal Soldiers Home, 549 S.W.2d 862, 865 (Mo.Banc 1977). Cf. Vorbeck v. McNeal, 560 S.W.2d 245, 250 (Mo.App. 1977) (mere censure of public employee by employer did not create a contested case).

As we understand the facts, the Personnel Board conducts hearings, makes a record, and makes recommendations upon which the City Manager bases his final disposition of the case. Viewed together, the Personnel Board and the City Manager are clearly an administrative agency that adjudicates contested cases--the Personnel Board provides the adversarial fact-finding hearing and the City Manager provides the finality needed for an adjudication.

The Honorable Doug Harpool

CONCLUSION

It is the opinion of this office that the Personnel Board of the City of Springfield is part of an administrative agency and, pursuant to Section 610.120, RSMo Supp. 1983, may have access to arrest records closed under Section 610.105, RSMo Supp. 1983.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

JOHN ASHCROFT
Attorney General

BANKS AND BANKING:

ESCHEATS:

UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT:

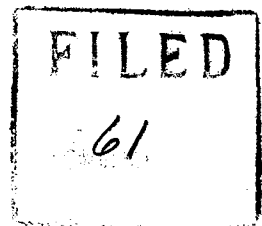
The State of Missouri
has a demonstrable
legal interest in the
contents of safe-de-

posit boxes recovered from closed national banks that were located in
Missouri prior to closing.

June 7, 1984

OPINION NO. 61-84

John A. Pelzer
Commissioner of Administration
State of Missouri
P. O. Box 809
Jefferson City, Missouri 65102



Dear Mr. Pelzer:

This opinion is in response to your request, filed pursuant to
Section 27.040, RSMo 1978,¹ for an opinion on the following question:

Does the State of Missouri have a demonstrable
legal interest under State Statute in certain
unclaimed funds recovered from National Banks
prior to 1933 by the Office of the Comptroller
of Currency pursuant to 12 U.S.C., Section 216.

12 U.S.C. Sections 216 to 216d (1982) and the Rules Implementing
Section 408 of the Garn-St Germain Depository Institutions Act of
1982, P.L. 97-320, 96 Stat. 1469, 1513-1515, 48 Fed. Reg. 30006-30008,
30012-30078 (Wednesday, June 29, 1983) (to be codified at 12 C.F.R.
Sections 33.1 to 33.7) provide procedures to facilitate the disposition
of unclaimed property² recovered from national banks and banks in the
District of Columbia that were closed before and during the 1930's by
receivers appointed by the Office of the Comptroller of the Currency.

¹"RSMo" is used as an abbreviation for the "Revised Statutes of
Missouri", and "RSMo Supp." is used as an abbreviation for the "Sup-
plement to the Revised Statutes of Missouri". Section 1.070, RSMo 1978.

²The definitions of the term "unclaimed property" found at 12
U.S.C. Section 216a(2) (1982) and 12 C.F.R. Section 33.3, 48 Fed. Reg.
30007 (Wednesday, June 29, 1983) indicate that the property in ques-
tion primarily consists of personal property or documents recovered
from safe-deposit boxes.

John A. Pelzer

12 C.F.R. Section 33.4(f), 48 Fed. Reg. 30007 (Wednesday, June 29, 1983) states:

(f) Claims filed by the states. Claims may be filed by states that, under their applicable statutory law, can assert a demonstrable legal interest in the property. State claims will be considered after claims filed by other persons have been determined. In accordance with instructions to the claims form, a claim filed by a state will be accompanied by an opinion from the state's highest legal official (e.g., attorney general) concerning the applicability of relevant state statutory laws and procedures that authorize the state to take possession of the unclaimed property.

I.

Uniform Disposition of Unclaimed Property Act

The Second Regular Session of the Eighty-Second General Assembly of the State of Missouri passed House Bill No. 1088 (hereinafter sometimes referred to as "H.B. 1088"), a copy of which is enclosed. Sections 1 to 30 thereof is Missouri's version of the Uniform Disposition of Unclaimed Property Act (Revised 1966), 8A U.L.A. 135-213 (1983) & Cumulative Annual Pocket Part 13-19 (1984). House Bill No. 1088 will become effective on August 13, 1984.³

12 U.S.C. Section 216b(a)(1) (1982) and 12 C.F.R. Section 33.4(c), 48 Fed. Reg. 30007 (Wednesday, June 29, 1983) provide that all claims for unclaimed property must be filed with the Comptroller of the Currency within twelve months following the publication of the final notice of claims by the Comptroller; such notice contains, in part, the names and locations of affected closed banks and the names of unlocated bank customers. 48 Fed. Reg. 30012-30078 (Wednesday, June 29, 1983).

³ Absent certain extraordinary circumstances, Article III, Section 29, Missouri Constitution, and Section 1.130, RSMo 1978, make bills effective ninety days after the adjournment of the legislative session in which they were enacted. Article III, Section 20(a), Missouri Constitution, provides that all bills in either house of the General Assembly are tabled as of midnight on April thirtieth of even-numbered years, and that the General Assembly is automatically adjourned on May fifteenth of even-numbered years. Thus, the Second Regular Session of the Eighty-Second General Assembly of the State of Missouri adjourned on May 15, 1984. Bills passed by that session of the General Assembly and approved by the Governor become effective ninety days thereafter, i.e., August 13, 1984, absent extraordinary circumstances.

John A. Pelzer

The effective date of H.B. 1088 occurs after the expiration of the claims filing period.

However, the Supreme Court of Missouri has begun to give litigants the benefit of newly enacted laws prior to the effective date of such enactments. See In re Marriage of Holt, 635 S.W.2d 335, 337-338 (Mo. banc 1982); State ex rel. Robards v. Casteel, 630 S.W.2d 583, 584 (Mo. banc 1982); State ex rel. Mendell v. Schoenlaub, 630 S.W.2d 584 (Mo. banc 1982). Upon the filing of a claim, the State of Missouri would become a litigant and is entitled to the benefit of newly enacted legislation, even before the effective date of such legislation.

Section 2(4) of H.B. 1088 states in part:

Section 2. The following property held or
owing by a banking or financial organization or
by a business association is presumed abandoned;

...

...

(4) Any funds or other personal property,
tangible or intangible, removed from a safe de-
posit box or any other safekeeping repository
or agency or collateral deposit box in this state
on which the lease or rental period has expired
due to nonpayment of rental charges or other rea-
son, or any surplus amounts arising from the sale
thereof pursuant to law, that have been unclaimed
by the owner for more than seven years from the
date on which the lease or rental period expired.

Section 1(1) of H.B. 1088 defines the term "banking organization" as meaning "any bank, trust company, or safe deposit company, engaged in business in this state;". (Emphasis added.) We believe that this definition includes nationally chartered, as well as state-chartered, banks.

Section 11 of H.B. 1088 requires the filing of reports of abandoned property with the Director of the Department of Consumer Affairs, Regulation and Licensing (hereinafter sometimes referred to as "CARL"), and Section 13 of H.B. 1088 requires the delivery of such reported property to CARL.

Section 2(4) of H.B. 1088 applies to safe-deposit boxes in the State of Missouri. Assuming that the safe-deposit boxes of the national banks listed in the notice at 48 Fed. Reg. 30048-30049 (Wednesday, June 29, 1983) are located in Missouri, the state has a demonstrable legal interest in the contents of the safe-deposit boxes of the following closed banks: The First National Bank of Brunswick, The First National Bank of Campbell, The First National Bank of Caruthersville, The First National Bank of El Dorado Springs, The First

John A. Pelzer

National Bank of Rolla, The Cherokee National Bank of St. Louis, The Grand National Bank of St. Louis, The Vandeventer National Bank of St. Louis, and The St. Louis National Bank.

Article I, Section 13, Missouri Constitution, prohibits the General Assembly of the State of Missouri from enacting retrospective legislation. Although we are applying H.B. 1088, which was enacted in 1984, to national banks closed before and during the 1930's, we do not believe such application violates this constitutional provision for two reasons.

First, in enacting Section 408 of the Garn-St Germain Depository Institutions Act of 1982, P.L. 97-320, 96 Stat. 1469, 1513-1515, we believe the United States Congress intended to create a federal relation-back doctrine, that allows state laws to relate back to the time the national banks in question closed, by operation of federal law.

Senate Report No. 536, 97th Cong., 2d Sess. at 29, reprinted in 1982 U.S. Code Cong. & Ad. News 3054, 3083, states in part:

A state may assert a right to possession of any unclaimed property during the twelve month claim period if it has a law, whenever adopted, that permits it to take custody of such property.

(Emphasis added.) We believe the "whenever adopted" language recognizes a federal relation-back theory, which allows state laws to relate back by virtue of federal law. Because the relation-back is based on federal law, the prohibition in Article I, Section 13, Missouri Constitution, against retrospective state legislation is not applicable.

The second reason we believe that Article I, Section 13, Missouri Constitution, does not apply is that this constitutional provision does not apply against the State of Missouri. See State ex rel. Meyer v. Cobb, 467 S.W.2d 854, 856 (Mo. 1971). Stated differently, if the General Assembly wishes statutes to apply retrospectively as against the State of Missouri, they will.

A basic difference between escheat laws and unclaimed property laws is that under the former the state takes title to the property after the expiration of a specified period of time, and the true owner's claim is forever barred, while under the latter, sometimes referred to as custodial acts, the state takes possession and use of the property while it remains unclaimed, but the true owner's claim is never barred. Comment, Unclaimed Property--A Potential Source of Non-Tax Revenue, 45 Mo. L. Rev. 493, 494 (1980).

The Prefatory Note to the Uniform Disposition of Unclaimed Property Act (Revised 1966), 8A U.L.A. 135, 136-137 (1983), states in part:

John A. Pelzer

The Uniform Act is custodial in nature-- that is to say, it does not result in the loss of the owner's property rights. The state takes custody and remains the custodian in perpetuity. Although the actual possibility of his presenting a claim in the distant future is not great, the owner retains his right of presenting his claim at any time, no matter how remote.

Missouri's adoption of the Uniform Disposition of Unclaimed Property Act abridges the state's right to claim title to such property under statutory or common law escheat provisions; it does not result in the loss of any citizen's property rights. Accordingly, because only the property rights of the state are involved, Article I, Section 13, Missouri Constitution, is inapplicable.

Section 15.1 of H.B. 1088 states:

Sections 1 to 30 of this act shall not affect property the title to which is vested in the holder by the operation of a statute of limitations prior to the effective date of this act, nor to any property held in a fiduciary capacity that was unclaimed property prior to August 13, 1974.

In Missouri, statutes of limitation are procedural in character and may not vest one with a substantive property right. See, e.g., State ex rel. Research Medical Center v. Peters, 631 S.W.2d 938 (Mo. App. 1982). One cannot become vested with a property interest by operation of a statute of limitations in Missouri. Neither is there anything that would lead us to believe that the Comptroller of the Currency is holding or that the closed national banks in question held this property in a fiduciary capacity.

Accordingly, we believe that the State of Missouri has a demonstrable legal interest in the property in question by virtue of H.B. 1088.

II.

Escheat

If our conclusion in I, infra, is incorrect, we believe that the State of Missouri has a demonstrable legal interest in this property by virtue of its escheat laws.

A.

Statutory Escheat

Section 470.010, RSMo 1978, states:

John A. Pelzer

If any person die intestate, seized of any real or personal property, leaving no heirs or representatives capable of inheriting the same; or, if upon final settlement of an executor or administrator, there is a balance in his hands belonging to some legatee or distributee who is a nonresident or who is not in a situation to receive the same and give a discharge thereof or who does not appear by himself or agent to claim and receive the same; or, if upon final settlement of an assignee for the benefit of creditors, there shall remain in his possession any unclaimed dividends; or, if upon final report of any sheriff to the court, it is shown that the interests in the proceeds of the sale of land in partition of certain parties, who are absent from the state, who are nonresidents, who are not known or named in the proceedings, or who, from any cause, are not in a situation to receive the same, are in his hands unpaid and unclaimed; or, if, upon final settlement of the receiver of any company or corporation which has been doing business in this state, there is money in his hands unpaid and unclaimed, in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of sections 470.010 to 470.260.

(Emphasis added.)

In Jones v. Fidelity Nat. Bank & Trust Co. of Kansas City, 362 Mo. 712, 243 S.W.2d 970 (banc 1951), copy enclosed, the court dealt with the following factual situation. On March 3, 1933, the Fidelity National Bank and Trust Company (hereinafter sometimes referred to as "National Bank"), a national banking association, and Fidelity Savings Trust Company (hereinafter sometimes referred to as "Missouri Corporation"), a Missouri corporation that was a wholly owned subsidiary of the National Bank, were closed because of financial difficulties and shortly thereafter reopened on a restricted basis; the National Bank was under the control of a federal conservator and the Missouri Corporation was under the control of a special deputy commissioner of finance. A reorganization plan for the National Bank was approved pursuant to 12 U.S.C. Section 207. A reorganization plan for the Missouri Corporation was approved pursuant to Section 362.505, RSMo 1949. Both of these statutes require a substantial percentage of the creditors to consent to the reorganization plan. As part of the plans, trust indentures were entered into by the banks and certain trustees were appointed to liquidate the remaining assets of the banks for the benefit of the creditors. After liquidating the assets of the banks and paying prior loans, the trustees declared liquidating dividends to certificate holders.

John A. Pelzer

The trustees brought two class actions, in part, to determine the rights of persons owed liquidating dividends who had not been located. The Attorney General of Missouri intervened, claiming, in part, that all unpaid dividends should escheat to the State of Missouri under Section 470.010, RSMo 1949, or under the doctrine of bona vacantia. Both class actions were consolidated on appeal.

The court indicated that the trust arrangement used to liquidate these banks was a common law assignment for the benefit of creditors, and that the unclaimed dividends of such would escheat to the state pursuant to Section 470.010, RSMo 1949.

Accordingly, if any of the property in question represents the unclaimed dividends of a bank liquidation, then under Jones, the State of Missouri may have a demonstrable legal interest in such. One way that the contents of a safe-deposit box could represent the unclaimed dividends of a bank liquidation is if the otherwise liquidated bank has a claim for unpaid rent against the contents of the safe-deposit box. Such a claim is in the interest of the creditors and might result in unclaimed dividends that escheat to the State of Missouri under Jones.

Generally though, the relationship between a bank and a person who rents a safe-deposit box from the bank is that of bailee or bailor. Kramer v. Grand National Bank of St. Louis, 336 Mo. 1022, 81 S.W.2d 961 (1935); Section 362.485(1), RSMo Supp. 1983. Accordingly, the contents of safe-deposit boxes are not usually liquidated for the benefit of creditors.

In addition to the claim under the Jones case, the State of Missouri may establish a demonstrable legal interest in the contents of these safe-deposit boxes under Sections 108 and 169 of S.B. 418, 1915 Mo. Laws 102, 155-157, 191-193 (hereinafter sometimes referred to as "S.B. 418") (copies enclosed) (presently codified at Section 362.485, RSMo Supp. 1983).⁴

Section 108 of S.B. 418 prescribes the following procedures with regard to unclaimed safe-deposit boxes in every "bank doing

⁴Sections 108 and 169 of S.B. 418 are substantially the same, except that Section 108 applied to banks, while Section 169 applied to trust companies. Sections 108 and 169 of S.B. 418 remained in effect and substantially unchanged until the enactment of Section 362.485 of S.B. 1, 1967 Mo. Laws 445, 492-494, which created a single statute applicable to banks and trust companies.

a safe deposit business"⁵, 1915 Mo. Laws at 155: If any amounts due any bank for the rental of a safe-deposit box remains unpaid for one year, such bank sends the record "owner" of the box a notice that if the amount due for the safe-deposit box rental is not paid within thirty days, the bank will open the safe-deposit box, inventory the contents, seal them, and place them in the bank's vault.

Section 108 of S.B. 418 then specifies procedures for the opening, inventorying, etc., of the safe-deposit boxes if the rent bill remained unpaid at the end of the thirty-day period. In part, these procedures included the sending of a notice of the opening of the safe-deposit box to the record owner. The record owner was then given a two-year period from the mailing of such notice to pay the rent due and other charges. At the expiration of the two-year period, another notice was sent to the owner informing him or her that the bank would sell the property not less than thirty days after the time of the mailing of the notice of sale. There were also provisions for the sale of the property at public auction and for the deduction of all rental charges from the sale proceeds. The balance, if any, is held by the bank in a special deposit; however, the bank was required to pay such amount to the owner of the property, the assignee of the property, or the legal representative on demand with satisfactory evidence of identity. If the funds in the special deposit remained unclaimed for a period of five years, such was treated as an unclaimed deposit. If the contents of the safe-deposit box consisted of papers, documents, or letters, the bank was to retain possession of such papers for a period of ten years. If such papers remained unclaimed at that time, they could be destroyed by the bank.

⁵The term "bank" was left undefined by S.B. 418. H.B. 610, 1923 Mo. Laws 223, defined the term "bank" in the following manner:

The term "bank" shall include any person, firm, association or corporation soliciting, receiving or accepting money, or its equivalent, on deposit or as a business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing.

Section 5404 of H.B. 272, 1939 Mo. Laws 796, 800, prohibits private banks in Missouri. Accordingly, the present definition of the term "bank" found at Section 362.010(3), RSMo 1978, omits any reference to persons, firms, or associations as "banks"; otherwise, the present definition is substantially the same as that quoted *supra*. It should be noted that this definition uses the word "include" and is not all-inclusive. State on inf. Taylor v. Currency Services, Inc., 358 Mo. 983, 990, 218 S.W.2d 600, 603 (banc 1949). We believe the above-quoted definition includes national banks.

John A. Pelzer

Sections 20 and 21 of S.B. 418, 1915 Mo. Laws 102, 112-113 (presently codified at Sections 361.200 to 361.210, RSMo 1978) and Sections 96 and 163 of S.B. 418, 1915 Mo. Laws 102, 149-150, 187-188 (presently codified at Section 362.390, RSMo 1978) disposed of unclaimed deposits. We believe that Section 108 of S.B. 418 incorporates the procedures therein for the disposition of unclaimed deposits. The State of Missouri thus has a demonstrable legal interest in all the contents of these safe-deposits, other than documents, under S.B. 418.

B.

Common Law Escheat

Section 1.010, RSMo 1978, states:

The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.

Under the common law doctrine of bona vacantia, the Crown took items of personal property not as ultimate owner, but rather for the sole reason that there was no other owner. Comment, Unclaimed Property--A Potential Source of Non-Tax Revenue, 45 Mo. L. Rev. 493, 493 (1980). The doctrine of bona vacantia would appear to have been displaced by Missouri statutory law under Section 1.010, RSMo 1978, to the extent that such statutes are applicable. If it is determined that such statutes are inapplicable, the doctrine of bona vacantia comes into play to give the state a demonstrable legal interest in the contents of these safe-deposit boxes.

Because of the uncertainty as to whether this property escheats to the State of Missouri or comes under H.B. 1088, we recommend that both CARL and the Office of Administration jointly or separately file

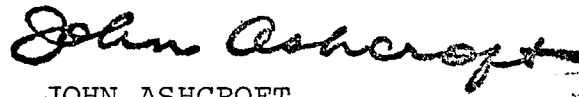
John A. Pelzer

claim(s) with the Comptroller of the Currency. Copies of relevant statutory and case law are included for use by the Comptroller's Office in processing this claim.

CONCLUSION

The State of Missouri has a demonstrable legal interest in the contents of safe-deposit boxes recovered from closed national banks that were located in Missouri prior to closing.

Yours very truly,



JOHN ASHCROFT
Attorney General

Enclosures:

House Bill No. 1088, 82nd General Assembly, Second Regular Session
Jones v. Fidelity Nat. Bank & Trust Co. of Kansas City, 362 Mo.
712, 243 S.W.2d 970 (banc 1951)
Senate Bill No. 418, 1915 Mo. Laws 102

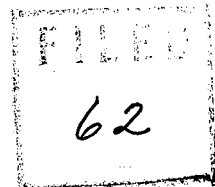
STATE EMPLOYEES' RETIREMENT SYSTEM:

A person who served in the General Assembly for two (2) biennial assemblies and who was a regular state employee for seven (7) years before terminating on or after July 1, 1981, is not a fully vested member of the Missouri State Employees' Retirement System under Section 104.335.2(2) of S.C.S.H.C.S.H.B. 1370, Eighty-Second General Assembly, Second Regular Session.

October 29, 1984

OPINION NO. 62-84

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
Post Office Box 209
Jefferson City, Missouri 65102



Dear Ms. Hackwood:

This opinion is in response to your question asking whether a person who served in the General Assembly for two (2) biennial assemblies and who was a regular state employee for seven (7) years before terminating on or after July 1, 1981, is a fully vested member of the Missouri State Employees' Retirement System.

Section 104.335.2(2) of S.C.S.H.C.S.H.B. 1370, Eighty-Second General Assembly, Second Regular Session (hereinafter "H.B. 1370"), became effective October 1, 1984; such subsection states:

Any member, whose employment terminated on or after July 1, 1981, and (a) who had served three or more biennial assemblies as a member of the general assembly, or (b) who was other than a member of the general assembly and who had ten or more years of vesting service at the date of termination of employment shall be entitled to a deferred normal annuity based on the member's creditable service, average compensation and the act in effect at the time the member's employment was terminated.

Mary-Jean Hackwood

See also subsections 3 and 4 of Section 104.335 of H.B. 1370.

Effective October 1, 1984, Section 104.374.1 of H.B. 1370 provides:

The normal annuity of a member, other than a member of the general assembly or a member who served in an elective state office, shall be an amount equal to one and one-third percent of the average compensation of the member multiplied by the number of years of creditable service of the member. [Emphasis added.]

Section 104.310(36) of H.B. 1370 defines the term "vesting service" as "the sum of a member's prior service credit and creditable service which is recognized in determining the member's eligibility for benefits under this system;". (Emphasis added.)

Section 104.310(14) of H.B. 1370 defines the term "creditable service" as "the sum of a member's membership service and creditable prior service which is recognized in determining the amount of the member's benefits under the system;". (Emphasis added.)

Section 104.310(27) of H.B. 1370 defines the term "membership service" as "service after becoming a member that is creditable in determining the amount of the member's benefits under this system;". (Emphasis added.)

Section 104.330.1, RSMo Supp. 1983, states in part:

As an incident to his contract of employment or continued employment, each employee of the state shall become a member of the system on the first day of the first month following the original effective date of sections 104.310 to 104.540, September 1, 1957, and every person thereafter becoming an employee shall become a member at the time of employment. . . . [Emphasis added.]

Section 104.310(21)(a) of H.B. 1370 defines the term "employee" to include each member of the General Assembly.

The hypothetical dealt with herein assumes that a person has served in the General Assembly for two (2) biennial assemblies and was a regular state employee for seven (7) years prior to terminating on or after July 1, 1981.

Mary-Jean Hackwood

Section 104.335.2(2) of H.B. 1370 requires service for three (3) or more biennial assemblies before one vests as a member of the General Assembly. Because the individual in question has served only two (2) biennial assemblies, such individual does not vest as a member of the General Assembly.

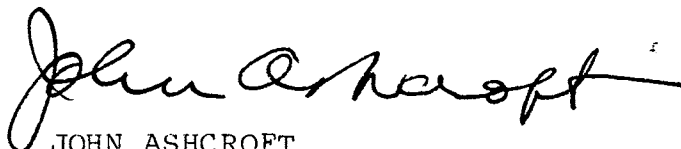
These same statutory provisions entitle ~~one who was other than~~ a member of the General Assembly with ten (10) or more years of "vesting service" to a deferred normal annuity. As shown above, "vesting service" includes all "creditable service" recognized in determining the member's eligibility for benefits under this system. "Creditable service" includes one's recognized "membership service". "Membership service" includes service after becoming a "member". Also shown above, is that membership in the Missouri State Employees' Retirement System is extended to members of the General Assembly by the definition of the term "employee" in Section 104.310(21)(a) of H.B. 1370.

Although members of the General Assembly are "members" of the Missouri State Employees' Retirement System, we do not believe that service rendered as a member of the General Assembly is recognized vesting service for one "who was other than a member of the general assembly" Section 104.335.2(2) of H.B. 1370. The establishment of vesting requirements for members of the General Assembly that are different than those for people who were "other than a member of the General Assembly" shows that "vesting service" as a member of the General Assembly is not interchangeable with "vesting service" as a regular state employee. Vesting service as a member of the General Assembly is recognized only for the "General Assembly" vesting requirements. Therefore, the individual in question is not fully vested.

CONCLUSION

It is the conclusion of this office that a person who served in the General Assembly for two (2) biennial assemblies and who was a regular state employee for seven (7) years before terminating on or after July 1, 1981, is not a fully vested member of the Missouri State Employees' Retirement System under Section 104.335.2(2) of S.C.S.H.C.S.H.B. 1370, Eighty-Second General Assembly, Second Regular Session.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

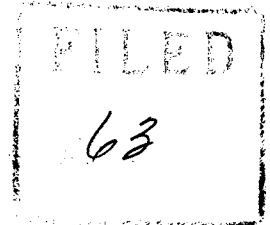
(314) 751-3321

May 16, 1984

DIRECT DIAL:

OPINION LETTER NO. 63-84

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees' Retirement System
P. O. Box 209
Jefferson City, Missouri 65102



Dear Ms. Hackwood:

This opinion is in response to your questions asking:

An employee terminated under the provisions of a statute previously in effect whereby the vesting benefit requirements were greater than they are under the present statute.

Benefit eligibility and payment is determined on the basis of the statute in effect at the time of termination. However, under the provisions of Section 104.610, RSMo [Supp. 1983] if the member has signed a consultant form "any person [emphasis added], who is receiving or hereafter may receive state retirement benefits . . . shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits the person would have received if his or her employment had terminated and he or she had retired under the provisions of the then applicable current retirement act or acts . . . [".]

- QUESTIONS: (1) Does [sic] current statute provisions govern eligibility requirement[s] for benefit payment?
- (2) If such person is eligible, what is applicable formula?

Mary-Jean Hackwood

- (3) What portion of the initial benefit payment would be payable from General Revenue?
- (4) What is the application of deferred normal annuity - payable at a future date. If a member is entitled to a deferred normal annuity, are the early retirement provisions applicable since in no place does the deferred benefit section refer to early retirement.

(Emphasis in original.)

The facts stated in your opinion request are as follows:

A member, with birthdate of 3-25-27, terminated on 4-19-66 with 17 years 9 months service.

The retirement statute in effect on 4-19-66 required 20 years of service to receive full benefit at age 60 or 15 years service to receive full benefit at age 65, or, at age 60, the member could receive reduced benefits.

Present Statute (Section 104.335 RSMo) provides deferred normal benefit without reduction at age 60 with 15 years service and reduced early retirement benefit at age 55 with 15 years service.

Section 104.400 provides reduced early retirement benefit to a member who has attained age 55 and who has at least 15 years of vesting service.

Section 104.330.1, RSMo 1959, provided that a member of the Missouri State Employees' Retirement System who was other than a member of the General Assembly vested after having fifteen or more years of creditable service.

Section 104.400, RSMo Supp. 1965, provided as follows:

1. Any member after attaining sixty years of age and having had at least fifteen years of creditable service may retire. In such case, the member shall receive a retirement annuity in an amount which is the actuarial equivalent of the normal annuity he would have received commencing at his normal retirement age.

2. Any member after attaining sixty years of age and having had at least twenty years of creditable service, or has served six years as a member of the general assembly, may retire. In such case the member shall receive a retirement annuity which shall equal one per cent of his average compensation multiplied by the number of years of creditable service of such member, or in case of a member of the general assembly, the retirement annuity provided in section 104.390 for members of the general assembly.

Section 104.335.1, RSMo Supp. 1983, makes the calculation of deferred normal annuities dependent upon the retirement act in effect at the time employment with the state was terminated. Section 104.400, RSMo Supp. 1983, has no such provision.

In State ex rel. Cleaveland v. Bond, 518 S.W.2d 649 (Mo. 1975), and State ex rel. Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 571 (Mo. banc 1962), the Supreme Court of Missouri held that the granting of retirement benefit increases to persons already retired from state service violated Article I, Section 13, Missouri Constitution; Article III, Section 38(a), Missouri Constitution; and Article III, Section 39(3), Missouri Constitution.

In State ex rel. Dreer v. Public School Retirement System of the City of St. Louis, 519 S.W.2d 290 (Mo. 1975), the court upheld the use of a consultant contract device, which authorized additional payments to retiree-consultants, as a method of avoiding the above-enumerated constitutional provisions.

Section 104.610, RSMo Supp. 1983, is a consultant contract statute entitling "[a]ny person who is receiving or may hereafter receive" certain state retirement benefits and who makes application for employment as a consultant to "be compensated monthly, in an amount, which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits the person would have received if his or her employment had terminated and he or she had retired under the provisions of the then applicable current retirement act or acts," Subsection 4 of Section 104.610, RSMo Supp. 1983, states in part: "The employment provided for by this section shall in no way affect any person's eligibility for retirement benefits under this chapter," (Emphasis added.)

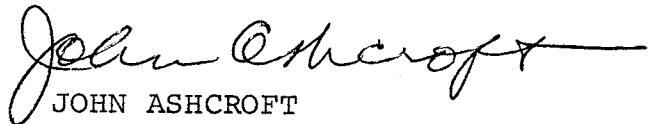
Section 104.610, RSMo Supp. 1983, applies only to people receiving or who may hereafter receive retirement benefits. This language does not evidence an intent to expand eligibility for retirement benefits through the consultant contract device. Subsection 4 of Section 104.610, RSMo Supp. 1983, also does not evidence an intent to expand eligibility for retirement benefits through the consultant contract device.

Mary-Jean Hackwood

Therefore, in light of the express provisions of Section 104.610, RSMo Supp. 1983, and in order to avoid the constitutional problems discussed in the Breshears and Cleaveland cases, we conclude that the formula used to determine eligibility for retirement benefits are those in effect at the time the individual in question leaves state employment, e.g., Sections 104.390 and 104.400, RSMo Supp. 1965.

In light of the answers given to the first two questions presented, the third and fourth questions are moot.

Yours very truly,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

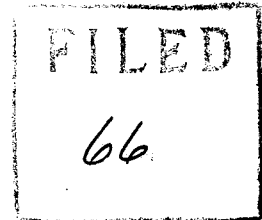
(314) 751-3321

March 22, 1984

DIRECT DIAL:

OPINION LETTER NO. 66-84

Dr. Arthur L. Mallory
Commissioner of Education
State Board of Education
P. O. Box 480
Jefferson City, Missouri 65102



Dear Dr. Mallory:

At your request, we have reviewed the Department's fiscal year 1985 Application for Federal Assistance under Title 1 of the Elementary and Secondary Education Act of 1965, as amended by the Education Consolidation and Improvement Act of 1981, for the provision of educational services to educationally deprived children of migratory agricultural workers and fishermen.

We have considered relevant provisions of the Elementary and Secondary Education Act of 1965, as amended, including the regulations thereunder, as well as Art. III, § 38(a), Mo. Const. (1945), and § 161.092, RSMo Supp. 1983.

This letter constitutes our official certification that the Missouri Department of Elementary and Secondary Education has the authority under state law to perform the duties and functions of a "state educational agency" as defined in Title I of P.L. 89-10, as amended (20 U.S.C. § 244(7)), including those arising from the assurances set forth in the application.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

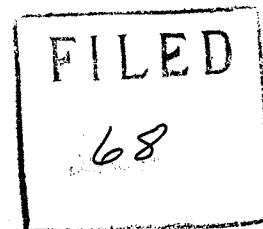
(314) 751-3321

June 11, 1984

DIRECT DIAL:

OPINION LETTER NO. 68-84

Honorable Thomas I. Osborne
Prosecuting Attorney
Audrain County Courthouse
Mexico, Missouri 65265



Dear Mr. Osborne:

This letter is in response to your request for an opinion of this office asking whether the juvenile officer of the Twelfth Judicial Circuit (Audrain, Montgomery and Warren Counties) is entitled to receive a salary as juvenile officer pursuant to Sections 211.381.1(2) and 211.393.2, RSMo Supp. 1983,¹ of \$18,690.00 per year and an additional salary pursuant to Sections 211.331.3 and 311.341, RSMo 1978, as superintendent of the juvenile detention facility.

Section 211.381.1(2) provides for the compensation of \$18,690.00 for one juvenile officer of the judicial circuit. Section 211.393.2 provides, among other matters, that in circuits composed only of counties of the third and fourth class, the salaries are payable monthly out of county funds and prorated among the counties served on a ratio determined by population, except that the salary of the juvenile officer of any such circuit in which he is engaged full-time is payable in installments by the State of Missouri not to exceed the annual sum of \$18,690.00 plus any salary adjustment provided pursuant to Section 476.405, RSMo.

Section 211.341, RSMo 1978, provides in pertinent part that counties of the third and fourth classes within one judicial circuit shall, upon the written recommendation of the circuit judge of that judicial circuit, establish a place of juvenile detention to serve all the counties within the judicial circuit. Upon doing so, some of the provisions of Section 211.331, RSMo 1978, apply. See Section 211.341.3, RSMo 1978. Section 211.331.3, RSMo 1978, in relevant part, provides that such place of detention shall be in the charge of a superintendent whose compensation and maintenance shall be fixed by the judge of the juvenile court, payable out of county funds.

¹All statutory references are to RSMo Supp. 1983, unless otherwise indicated.

Honorable Thomas I. Osborne

In our Opinion No. 130-1966, copy enclosed, this office concluded that the phrase, "engaged full-time" as used in Section 211.393.2, RSMo Supp. 1965, means that the juvenile officer, in order to qualify for the statutory contribution by the State of Missouri, may not hold another office or position and may not engage in any activity which would impair his ability to faithfully perform his duty as a juvenile officer. We noted, in that opinion, that such phrase means that the juvenile officer must give his position his complete and undivided attention and may not engage in any other activities which would either consume any portion of the time required for him to properly function as a juvenile officer, or which would in any respect interfere with his ability to perform his duties as such. We expressed our view in that opinion that this means that such juvenile officer would not be "engaged full-time" if he at the same time attempted to occupy or hold any other position or engage in any activity which would impair his capacity, devotion or time required and customary for the full performance of the occupation of juvenile officer. Cf. Vestal v. City of St. Joseph, 413 S.W.2d 537 (K.C. App. 1967) and Coleman v. Kansas City, 348 Mo. 916, 156 S.W.2d 644 (Mo. 1941).

The requirement contained in Section 211.393.2 is that, where the state is to pay the juvenile officer's salary, the juvenile officer must be engaged full-time at such position. It is our view that if the juvenile officer also holds the position of superintendent of the detention facility, pursuant to Sections 211.331.3 and 211.341, RSMo 1978, he holds a statutorily distinct position from that of juvenile officer. As a consequence, it is our view that his salary as juvenile officer is not eligible for state payment pursuant to Section 211.393.2.

We also note that Section 211.381.4 provides that the compensation provided therein for employees of the juvenile court in second, third and fourth class counties is the total amount of compensation the employee shall receive for duties pertaining to the juvenile court and includes the compensation provided by any other provision of law. We interpret this subsection to preclude additional payment to a juvenile officer for performing duties as superintendent of the detention facility.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Opinion No. 130-1966

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

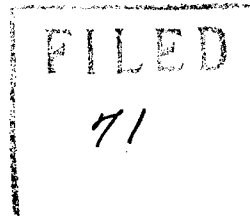
April 30, 1984

(314) 751-3321

DIRECT DIAL:

OPINION LETTER NO. 71-84

The Honorable Ron Auer
Representative, District 68
State Capitol Building, Room 409B
Jefferson City, Missouri 65101



Dear Representative Auer:

This opinion is in response to your questions asking:

Question No. 1. It is my understanding that the isolated or occasional sale of tangible personal property by an individual not engaged in business does not subject the transaction to a sales tax. Is a rummage or garage sale a "partial liquidation" within the meaning of subdivision (2) of subsection 1 of section 144.010, RSMo Supp. 1983, and thereby subject to collection of the sales tax on all receipts?

Question No. 2. Is a person who conducts a garage sale at his home twice per year and has gross sales of less than three thousand dollars per year exempt from collecting and paying sales tax to the state?

Question No. 3. Is a person who rents space at a "flea market" on a weekly basis to sell personal property but has less than three thousand dollars in gross sales per year exempt from collecting and paying sales tax to the state?

Question No. 4. Is a person engaged in "tailgate sales" of vegetables with less than three thousand dollars in gross sales per year exempt from collecting and paying sales tax to the state?

Section 144.020.1(1), RSMo Supp. 1983, states:

A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

The Honorable Ron Auer

(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, except as otherwise provided in section 144.025; [Emphasis added.]

Section 144.010.1(8), RSMo Supp. 1983, defines the phrase "sale at retail", in part, in the following manner:

"Sale at retail" means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; provided, however, . . . [Emphasis added in part.]

Section 144.010.1(2), RSMo Supp. 1983, defines the word "business" as:

"Business" includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of sections 144.010 to 144.150. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of sections 144.010 to 144.510 unless the total amount of the gross receipts from such sales, exclusive of receipts from the sale of tangible personal property by persons which property is sold in the course of the partial or complete liquidation of a household, farm or nonbusiness enterprise, exceeds three thousand dollars in any calendar year. The provisions of this subdivision shall not be construed to make any sale of property which is exempt from sales tax or use tax on June 1, 1977, subject to that tax thereafter. [Emphasis added.]

In Staley v. Missouri Director of Revenue, 623 S.W.2d 246, 250 (Mo. banc 1981), the court interpreted the "occasional or isolated sale" provision as it appeared in Section 144.010.1(2), RSMo 1978, stating:

The Honorable Ron Auer

It permits the assessment of sales tax on "isolated or occasional sales" over \$3,000 in a year and maintains the exempt status of many if not all of those sales which the legislature intended to exclude prior to June 1, 1977 (i.e., those "isolated or occasional sales" which are either less than \$3,000 or which constitute a liquidation of a household, farm, or nonbusiness enterprise).

12 CSR 10-3.004 (as last amended August 6, 1980, effective January 1, 1981) states:

(1) Determining whether the sale of tangible personal property is subject to the general sales tax is dependent upon whether or not the seller is engaged in the business of selling tangible personal property at retail.

(2) Except as specified in this rule, the isolated or occasional sale of tangible personal property by a person not engaged in such business does not constitute engaging in business, within the meaning of the sales tax law.

(3) In determining whether or not a person is engaged only in the "isolated or occasional" sale of property or service, the Department of Revenue will look to the following criteria:

(A) Any holding out as being engaged in business by the seller such as telephone yellow page listing, business cards, solicitation, advertising, business licenses, etc.;

(B) Regularity and number of sales within a given period;

(C) Duration of sales activity;

(D) The nature of the service or property being sold and the nature of the market;

(E) The physical setting in which the sales activities are conducted; and

(F) The nature and types of customers.

(4) Persons who, on an isolated or occasional basis, sell tangible personal property in the course of the partial or complete liquidation of a household, farm or non-business enterprise will not be deemed to be engaged in business, even if the total amount of the gross receipts from such sales exceeds three thousand dollars in any calendar year.

The Honorable Ron Auer

12 CSR 10-3.006(1)(A), (C), and (H) (as last amended August 6, 1980, effective January 1, 1981) state:

(1) The following are general examples illustrating the treatment of isolated or occasional sales:

(A) G, a homeowner, holds a garage sale in which he disposes of old clothing, furniture, appliances and other household goods. This is an isolated or occasional sale by one who is not engaged in the business of selling tangible personal property and is not subject to the sales tax;

(C) F regularly goes to farm sales, auctions, and garage sales looking for bargains and he holds his own "garage sale" on a monthly basis in which he disposes of his purchases for an appropriate profit. F is not making isolated or occasional sales but is actually engaging in the business of selling and his sales are subject to the sales tax;

(H) Sally Brush frequently goes to summer flea markets, arts and craft festivals and neighborhood affairs to sell her paintings, sketches and artifacts. Sally is not making isolated or occasional sales but is actually engaging in the business of selling and her sales are subject to sales tax.

I.

Question No. 1: Partial Liquidations

The first question presented implies that if a garage sale is considered a partial liquidation of a household, then it is subject to the Sales Tax Law. As the Staley case indicates, isolated or occasional sales of over \$3,000 in each calendar year that are considered partial liquidations of a household are not subject to the Sales Tax Law.

II.

Question No. 2: Garage Sales

The second question presented asks whether garage sales held two times per year with gross receipts of less than three thousand dollars per year are subject to the Sales Tax Law.

12 CSR 10-3.006(1)(A) indicates that a single garage sale is an isolated or occasional sale. 12 CSR 10-3.006(1)(C) indicates that garage sales held on a monthly basis are not isolated or occasional

The Honorable Ron Auer

sales. Here, the garage sales are held two times per year. We believe that such garage sales are occasional sales, and that, without additional circumstances indicating an opposite result, such garage sales would not be considered engaging in the business of selling by a court of law. Accordingly, garage sales held two times per year with gross annual receipts of less than three thousand dollars are not subject to the Sales Tax Law.

III.

Question No. 3: Flea Markets

The third question presented asks whether weekly sellers at flea markets are subject to the Sales Tax Law.

We believe that such sellers are engaging in the business of selling, and that such sales are not isolated or occasional. See 12 CSR 10-3.006(C).

IV.

Question No. 4: Tailgate Sales

The fourth question presented asks whether tailgate sales of vegetables are subject to the Sales Tax Law. The question does not state how often such tailgate sales are held. Because the determination of whether sales are isolated or occasional depends upon the regularity and number of sales within a given period, 12 CSR 10-3.004 (3)(B), we are unable to answer this question without knowledge of the frequency of such tailgate sales.

Yours very truly,



JOHN ASHCROFT
Attorney General

COORDINATING BOARD FOR HIGHER EDUCATION:

GRANT OF PUBLIC MONIES:

MISSOURI STUDENT GRANT PROGRAM:

STATE SCHOLARSHIPS:

STUDENT FINANCIAL ASSISTANCE PROGRAM:

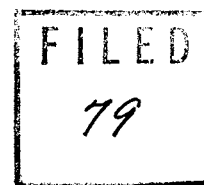
a career in religious work does not violate Article I, Section 7, of the Missouri Constitution.

The award of a Missouri student grant to a recipient who intends to undertake a

August 27, 1984

OPINION NO. 79-84

Shaila R. Aery, Commissioner
Coordinating Board for Higher Education
101 Adams Street
Jefferson City, Missouri 65101



Dear Dr. Aery:

This is in response to your request for an opinion as follows:

Does the use of public funds to provide student grants where students also receive institutional[ly] administered scholarships and/or grants based on the students' written commitment to a church-related-vocation constitute use of public funds for sectarian religious purposes and thus violate the provisions of the Missouri Constitution, Article I, Section 7?

It is our understanding that your question asks whether the Coordinating Board for Higher Education, in the course of administering the Student Financial Assistance Program (sometimes known as the "Missouri Student Grant Program"), Sections 173.200 to 173.230, RSMo 1978 and RSMo Supp. 1983 (hereinafter sometimes referred to as the "Act" or the "Program"), may grant public monies to certain students who have committed themselves to a career in church ministry, the result of which is that they^{1/} receive financial aid from other sources based on that commitment.^{1/}

1/

In rendering this opinion we answer only the very broad question you ask. We render no opinion as to whether a particular degree program offered by an approved private institution might violate Sections 173.200 and 173.215.1(6), RSMo Supp. 1983.

Article I, Section 7, Missouri Constitution, states:

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

. . .

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Section 173.200, RSMo Supp. 1983,^{2/} states:

The general assembly, giving due consideration to the historical and continuing interest of the people of the state of Missouri in encouraging deserving and qualified youths to realize their aspirations for higher education, finds and declares that higher education for residents of this state who desire such an education and are properly qualified therefor is important to the welfare and security of this state and the nation, and consequently is an important public purpose. The general assembly finds and declares that the state can achieve its full economic and social potential only if every individual has the opportunity to contribute to the full extent of his capabilities and only when financial barriers to his economic, social and educational goals are removed. It is, therefore, the policy of the general assembly and the purpose of sections 173.200 to 173.230 to establish a financial assistance program to enable qualified full-time students to receive nonreligious education services in a public or private institution of higher education of their choice. [Emphasis added.]

^{2/}

All statutory references are to RSMo Supp. 1983, unless otherwise indicated.

Section 173.215.1(6) states:

No award shall be made under sections 173.200 to 173.230 to any applicant who is enrolled, or who intends to use the award to enroll, in a course of study leading to a degree in theology or divinity.

The facial validity of Missouri Financial Assistance Program was upheld in American United v. Rogers, 538 S.W.2d 711 (Mo. banc 1976), cert. denied, 429 U.S. 1029 (1976). There, the Missouri Supreme Court upheld the Act against challenges based on the First Amendment to the United States Constitution, Article I, Section 6, Article I, Section 7, Article III, Section 38(a), Article IX, Section 8, and Article X, Section 3, Missouri Constitution (1945) (as amended). The Supreme Court expressly noted that additional constitutional challenges to the implementation of the Missouri Financial Assistance Program were permitted. See also, Missourians for Separation of Church and State v. Robertson, 592 S.W.2d 825 (Mo. App. 1979).

Thus, the implementation of the act is very important, as is pointed out in the concurring opinion in Americans United:

In the instant case there is no provision in the statute under attack which directs or authorizes the use by a school of the award money for sectarian religious purposes. To the contrary, it appears that the proscription against the use of such funds for a course of study leading to a degree in theology or divinity clearly evidences a legislative intent that the money not be used for sectarian religious purposes. The coordinating board for higher education is the administrative agency charged with implementation of the program established by sections 173.200-173.235 and is vested with the power to "promulgate reasonable rules and regulations for the exercise of its functions and the effectuation of the purposes of sections 173.200 to 173.235." Sec. 173.210, RSMo Supp. 1975. It is clear from the "purpose" section of the act (sec. 173.200) and the other provisions of the act that it was not the intent of the legislature to provide money for sectarian religious purposes.

Americans United, 538 S.W.2d at 723 (Bardgett, J., concurring).

It appears to us that the crucial question which we must answer is whether the provision of Missouri Student Grant funds to

students who are committed to entering the Christian ministry upon graduation constitutes a "sectarian religious purpose".

In rendering this opinion we are aware of Missouri appellate case law holding that the state may not lend school text books to pupils and teachers for use in nonpublic schools, Paster v. Tussey, 512 S.W.2d 97 (Mo. banc 1974), cert. denied, 419 U.S. 1111 (1975); Mallory v. Barrera, 544 S.W.2d 556 (Mo. banc 1976); that public funds may not be used to support a parochial school, Berghorn v. Reorganized School District No. 8, Franklin County, 364 Mo. 121, 260 S.W.2d 573 (1953); Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942); and that it is unlawful for public funds to be used to transport students to and from parochial schools, McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (Mo. banc 1953); Luetkemeyer v. Kaufmann, 364 F.Supp. 376 (W.D. Mo. 1973), aff'd, 419 U.S. 888 (1974).

In distinguishing these cases in Americans United, the Supreme Court properly noted that there is a difference between elementary and secondary education and educational opportunities available at the college level. The Court noted:

[W]e take solace in the fact that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: "Institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students and a diversity of religious background in faculty and students." Id. at 722.^{3/}

3/

We note that Section 173.205(2) defines an "approved private institution" as:

[A] non profit institution, dedicated to educational purposes, located in Missouri, which:

* * *

(d) Does not discriminate in the hiring of administrators, faculty and staff or in the admission of students on the basis of race, color, religion, sex, or national origin and is in compliance with the Federal Civil Rights Acts of 1964 and 1968 and executive orders issued pursuant thereto. Sex discrimination as used herein shall not apply to admission

In determining whether a grant of Missouri Student Grant funds to a student who is committed to a career in the Christian ministry is a "sectarian religious purpose", we are confronted with the clear language of Section 173.200 and Americans United. The General Assembly and the Supreme Court of this state have concluded that:

Higher secular education today is unquestionably considered to be a contributing factor toward the betterment of society, and we find nothing in the constitution of this state prohibiting the legislative department from declaring the encouragement thereof a "public purpose". Americans United, 538 S.W.2d at 719.

We conclude, as did the Supreme Court, that "the statutory program does have a primary effect other than the advancement of religion." (Emphasis in original.) Id., at 721.

Given that the primary effect of the Missouri Financial Assistance Program is not the advancement of religion, we are of the view that the public purpose of the program far outweighs the incidental benefit which may result to a religious organization when, and if, a recipient of the funds undertakes a subsequent career in religious work.

CONCLUSION

It is therefore, the opinion of this office, that the award of a Missouri student grant to a recipient who intends to undertake a career in religious work does not violate Article I, Section 7, of the Missouri Constitution.

Very truly yours,



JOHN ASHCROFT
Attorney General

(footnote continued from previous page)
practices of institutions offering the
enrollment limited to one sex;

(e) Permits faculty members to select
textbooks without influence or pressure by any
religious or sectarian source;

See also Section 173.205(3)(d) and (e) (defining "approved public institution").

STATE EMPLOYEES' RETIREMENT SYSTEM:

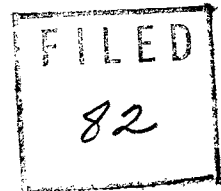
Members of the
Missouri State
Employees' Retirement
System who terminate

state employment on or after April 1, 1984, but before October 1, 1984, are not entitled to the benefit of the graded vesting schedule found at Section 104.335.3 S.C.S.H.C.S.H.B. of 1370, 82nd Gen. Ass., 2d Reg. Sess.

July 18, 1984

OPINION NO. 82-84

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101



Dear Ms. Hackwood:

This opinion is in response to your question asking whether members of the Missouri State Employees' Retirement System (hereinafter sometimes referred to as "MOSERS") who terminate their employment with the State on or after April 1, 1984, but before October 1, 1984, are entitled to the benefit of the graded vesting schedule found at Section 104.335.3 of S.C.S.H.C.S.H.B. 1370, 82nd Gen. Ass., 2d Reg. Sess. ^{1/}

Section 104.335.3, supra, states, in part, that it applies to "Any member whose employment terminated on or after April 1, 1984," Section A, supra, states: "Section 1 of this act shall become effective October 1, 1984." Section 1, supra, repeals, in relevant part, Section 104.335, RSMo Supp. 1983, and enacts Section 104.335, supra, in lieu thereof. Thus, the new Section 104.335 does not become effective until October 1, 1984, but on its face, relates back to employment terminations occurring on or after April 1, 1984, but before October 1, 1984.

Article III, Section 38(a), Missouri Constitution, states, in part: "The general assembly shall have no power to grant public money or property, . . . , to any private person, association or corporation, excepting [certain provisions not relevant here]."

^{1/}

Section 104.335.3, supra, makes certain members of MOSERS who terminate with five or more but less than ten years of vesting service "partially" vested.

Article III, Section 39(3), Missouri Constitution, states:

The general assembly shall not have power:

. . .

(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;

In Cleaveland v. Bond, 518 S.W.2d 649 (Mo. 1975), the court dealt with the validity of Sections 476.520 and 476.570, Sections 2 and 12, respectively, of H.C.S.S.C.S.S.B. 132, 1971-1972 Mo. Laws 453-455. These statutes granted retirement benefits retroactively to judges who ceased to hold office prior to the effective date of these statutes. The court held that to the extent that these statutory provisions granted retirement benefits to persons not in the employ of the State on the effective date of the statutory provisions, these statutes violate Article III, Sections 38(a) and 39(3), Missouri Constitution. Although there are factual differences between the Cleaveland case and the instant facts, we believe that the reasoning of the Cleaveland case applies.

Likewise, Article I, Section 13, Missouri Constitution, states:

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

. . .

That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

(Emphasis added.)

A law which is "retrospective in its operation" is one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed. State ex rel. St. Louis-San Francisco Railway Company v. Buder, 515 S.W.2d 409, 410 (Mo. banc 1974).

State ex rel. Phillip v. Public School Retirement System of the City of St. Louis, 364 Mo. 395, 262 S.W.2d 569, 576-577 (banc 1953), indicates that early public pension or retirement systems merely created gratuitous allowances, but that the newer retirement systems do create vested rights that are contractual obligations of the State. It is clear that MOSERS is of the newer variety that creates vested rights for employees and contractual obligations on the part of the State. Sections 104.330 and 104.540, RSMo Supp. 1983.^{2/}

Thus, in creating a new graded vesting schedule, Section 104.335.3, supra, imposes new "obligations" on the State and is a law which is "retrospective in operation". MOSERS may not be subject to a retrospective law under Article I, Section 13, Missouri Constitution. State ex rel. Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 571, 576-577 (Mo. Banc 1962).^{3/}

Accordingly, Section 104.335.3, supra, may not constitutionally vest members of MOSERS who terminate on or after April 1, 1984, but before October 1, 1984, with retirement benefits, because its effective date is October 1, 1984, see Sections A and 1, supra; Section 1.130(2), RSMo 1978.

2/

Article III, Section 37, Missouri Constitution, prohibits the General Assembly from contracting for, or authorizing the contracting of, any obligations of the State, with certain exceptions not relevant here. In Board of Public Buildings v. Crowe, 363 S.W.2d 598, 604 (Mo. banc 1962), the court indicated that state obligations to pay rent are always subject to the condition that the General Assembly appropriate moneys for the payment of the rent. Thus, rental "obligations" do not violate Article III, Section 37, Missouri Constitution. MOSERS is not a fully funded retirement system; it operates, in part, on appropriations on a "pay-as-you-go" funding method. See Sections 104.436 to 104.440, RSMo Supp. 1983, and Sections 104.436 to 104.440, supra. Accordingly, MOSERS' obligations are subject to the condition that the General Assembly appropriate funds to meet such obligations once the benefit fund has been depleted.

3/

In State ex rel. Meyer v. Cobb, 467 S.W.2d 854, 856 (Mo. 1971), the court indicated that the General Assembly may pass retrospective laws impairing the State's rights if the rights of private citizens are not impaired. The Cobb case did not overrule, distinguish, or otherwise discuss the Breshears case. Accordingly, we follow the Breshears case in this instance because it deals with MOSERS.

Section 1.140, RSMo 1978, states:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

We believe that, under Section 1.140, RSMo 1978, the "on or after April 1, 1984" termination proviso is severable from the remaining portions of Section 104.335.3, supra. Accordingly, the term "whose employment terminated on or after April 1, 1984, and" should be struck from Section 104.335.3, supra, so that it reads: "Any member who was other than a member of the general assembly"

CONCLUSION

It is the opinion of this office that members of the Missouri State Employees' Retirement System who terminate state employment on or after April 1, 1984, but before October 1, 1984, are not entitled to the benefit of the graded vesting schedule found at Section 104.335.3 of S.C.S.H.C.S.H.B. 1370, 82nd Gen. Ass., 2d Reg. Sess.

Very truly yours,



JOHN ASHCROFT
Attorney General

JUDGES:
JUDICIAL RETIREMENT:
RETIREMENT:
STATE EMPLOYEES' RETIREMENT SYSTEM:

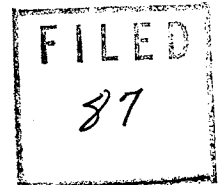
The retirement compensation provided by Section 476.530, RSMo 1978, is fifty percent (50%) of the compensation

provided by law at the time the judge in question leaves office.

October 18, 1984

OPINION NO. 87-84

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101



Dear Ms. Hackwood:

This opinion is in response to your question asking:

Is the retirement compensation provided for under Section 476.530 RSMo 1978 to be 50% of the compensation provided by law at the time a judge leaves office or 50% of the compensation provided by law at the date a judge is eligible to receive a retirement benefit?

Section 476.530, RSMo 1978, states:

The retirement compensation shall be equal to fifty percent of the compensation provided by law at the time of retirement for the judges of the highest court on which the retired judge served as a full-time judge. Retirement compensation shall be paid to the retired judge monthly during the remainder of his life. [Emphasis added.]

Your question asks whether the "time of retirement" for purposes of Section 476.530, RSMo 1978, is the time at which a judge leaves office or the time at which a judge is eligible to receive retirement benefits. Looking to both of the judicial retirement systems, Sections 476.450 to 476.510, RSMo 1978 and Supp. 1983, and Sections 476.515 to 476.570, RSMo 1978, RSMo Supp. 1983, House Bill No. 1370, 82d General Assembly, 2d Regular Session (effective October 1, 1984) and Senate Bill No. 491, 82d General Assembly, 2d Regular Session (effective August 13, 1984) (hereinafter sometimes

Mary-Jean Hackwood

referred to as the "Second Judicial Retirement System") and to Article V of the Constitution of Missouri, especially Sections 24.2 and 26 thereof, we are unable to find an applicable definition of the word "retirement".

The construction of retirement acts "primarily involves determining the intent of the legislature," Golphin v. City Council of Augusta, 103 Ga. App. 53, 118 S.E.2d 281, 282 (1961).

The purposes of retirement acts are stated in State ex rel. Cleaveland v. Bond, 518 S.W.2d 649, 652 (Mo. 1975) (quoting, Dillon on Municipal Corporations Section 430 (5th ed.)), as follows:

The justification and basis for the enactment of statutes providing retirement benefits for public officers and employees is the public benefit to be derived from (1) encouraging competent and faithful public officers and employees to remain in the service over prolonged periods and not to seek employment elsewhere, and (2) encouraging retirement from public service of "those who by devoting their best energies for a long period of years to the performance of duties in a public office or employment have, by reason thereof or of advanced age, become incapacitated from performing the duties as well as they might be performed by others more youthful or in greater physical or mental vigor. * * *"

In examining the incentives created in concluding that the "time of retirement" is the time at which a judge is eligible for retirement benefits, one finds the following: Under Section 476.520, RSMo 1978, a person needs, inter alia, to be at least sixty-five (65) years of age and to have served in this state an aggregate of twelve (12) years, continuously or otherwise, as a judge before being eligible for benefits under the Second Judicial Retirement System. Thus, if the "time of retirement" is the time at which a judge is eligible for retirement benefits, a judge under age sixty-five (65) could "retire" under the Second Judicial Retirement System, after serving twelve (12) years as a judge and begin receiving retirement benefits at age sixty-five (65) in the same amount as judges who remained in state service continuously until reaching age sixty-five (65).

The foregoing construction of the statute does not encourage competent and faithful judges to remain in state service. This construction would be inconsistent with the purposes of retirement acts, as expressed in the Cleaveland case. Accordingly, we

Mary-Jean Hackwood

conclude that the "time of retirement" for purposes of Section 476.530, RSMo 1978, is the time at which a judge leaves office.

CONCLUSION

It is the opinion of this office that the retirement compensation provided by Section 476.530, RSMo 1978, is fifty percent (50%) of the compensation provided by law at the time the judge in question leaves office.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized font. The "J" is large and loops around the "o". The "A" is also large and loops around the "s". The "C" is a simple loop. The "r" is a simple vertical stroke. The "o" is a simple loop. The "f" is a simple vertical stroke. The "t" is a simple vertical stroke.

JOHN ASHCROFT
Attorney General

STATE EMPLOYEES' RETIREMENT SYSTEM:

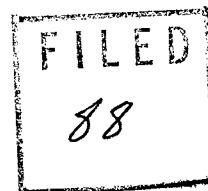
Section 476.515.2 of
S.C.S.H.C.S.H.B. 1370,

Eighty-Second General Assembly, Second Regular Session, which provides for benefits for surviving spouses of judges who have remarried and who were not eligible for such benefits prior to the amendment of Section 476.515, is unconstitutional and cannot be given effect. Furthermore, Section 476.515 may not be applied to a surviving spouse of a judge who remarried after October 1, 1984, if the deceased judge ceased to hold office prior to that date.

July 26, 1984

OPINION NO. 88-84

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees' Retirement System
Post Office Box 209
Jefferson City, Missouri 65102



Dear Ms. Hackwood:

This opinion is in response to your question as follows:

House Bill 1370 as passed by the legislature and signed by the Governor contains a provision which directs us to restore benefits to a surviving spouse whose benefits have terminated (Section 476.515.2). This section of the statute is effective October 1, 1984. Therefore, if any affected person applied to the Board within six months after October 1, 1984, the benefits would be initiated effective October 1, 1984. Is it legal to pay benefits retroactively?

Section 476.515 of S.C.S.H.C.S.H.B. 1370, Eighty-Second General Assembly, Second Regular Session, provides as follows:

1. As used in sections 476.515 to 476.565, unless the context clearly indicates otherwise, the following terms mean:

(1) "Beneficiary", a surviving spouse married to the deceased judge continuously for a period of at least two years immediately preceding his death and also on the day of the last termination of his employment as a judge, or if there is no surviving spouse eligible to

receive benefits under sections 476.515 to 476.570, the term "beneficiary" shall mean any unemancipated minor child of the deceased judge, who shall share in the benefits on an equal basis with all other beneficiaries;

(2) "Benefit", a series of equal monthly payments payable during the life of a judge retiring under the provisions of sections 476.515 to 476.570 or payable to a beneficiary as provided in sections 476.515 to 476.570; all benefits paid under sections 476.515 to 476.570 in excess of any contributions made to the system by a judge shall be considered to be a part of the compensation provided a judge for his services;

(3) "Commissioner of administration", the commissioner of administration of the state of Missouri;

(4) "Judge", any person who has served or is serving as a judge or commissioner of the supreme court or of the court of appeals, or as a judge of any circuit court, probate court, magistrate court, court of common pleas or court of criminal corrections of this state, justice of the peace or as commissioner of the probate division of the circuit court appointed after January 1, 1979, in a county of the first class having a charter form of government;

(5) "Salary", the total compensation paid for personal services as a judge by the state or any of its political subdivisions.

2. A surviving spouse whose benefits were terminated because of remarriage prior to the effective date of this act shall, upon written application to the board within six months after the effective date of section 1 of this act, have her rights as a beneficiary restored. Benefits shall resume as of the effective date of section 1 of this act.

This amendment changes prior Section 476.515 by deleting the words "an unremarried" which followed the word "[b]eneficiary" in subsection 1(1) and by adding the provision quoted above in subsection 2. This Act was approved by the Governor on April 27, 1984, and expressly provides that Section 476.515 becomes effective October 1, 1984. Section A of S.C.S.H.C.S.H.B. 1370.

Mary-Jean Hackwood

The clear intent of the amendment is to provide for benefits to such a surviving spouse even after remarriage and to make such benefits available to any otherwise eligible surviving spouse who was not previously eligible because of remarriage, upon written application to the Board within six months after the effective date, October 1, 1984.

It is our view that the question presented falls squarely within the holding of State ex rel. Cleaveland v. Bond, 518 S.W.2d 649 (Mo. 1975), in which the Missouri Supreme Court held that the statutes which granted retirement benefits retroactively to a judge who ceased to hold office prior to the enactment of this statute are unconstitutional as constituting the granting of public money to a private person and the granting of an extra allowance to a public officer after services have been rendered. See Article III, Sections 38(a) and 39(3), Missouri Constitution. The opinion of the court in Cleaveland noted that most courts hold that statutes which purport to grant pensions to persons already retired from public employment at the time of the enactment are unconstitutional as amounting to gratuities for private purposes or as within a prohibition against the giving of extra compensation to a public officer or employee after service has been rendered, or the like. The justification and basis for the enactment of the statutes providing retirement benefits to public officers and employees is the public benefit to be derived from (1) encouraging competent and faithful public officers and employees to remain in the service over prolonged periods and not seek employment elsewhere, and (2) encourage retirement from public service of those who, by devoting their best energies for a long period of years to the performance of duties in a public office or employment, have by reason thereof, or of advanced age, become incapacitated from performing the duties as well as they might be performed by others more youthful or in greater physical or mental vigor.

The court in Cleaveland, Id. at 653-654, stated:

In Judge Cleaveland's case there could be no public benefit by allowing his claim, nor could his service record have been affected by the act. He had already entered the service, served a prolonged time (32 years), and retired several months prior to the passage of the act. Obviously he was not encouraged to enter, remain in or leave the service because of the inducement of benefits under the act. The only possible justification for including him would be on some theory of reward for past services rendered, which would constitute the grant of extra compensation to a private individual after the service had been rendered, or in other words a gratuity. To rule that the General Assembly has the power retroactively to

Mary-Jean Hackwood

reward an ex-judge by extending retirement benefits under the circumstances of this case would open the door to the squandering of public money referred to in Kizior v. City of St. Joseph, 329 S.W.2d 605, 610[4] (Mo. 1959).

The remarried surviving spouses referred to in subsection 2 of Section 476.515 were not eligible to receive benefits under prior law and, as to them, the granting of such benefits is, in our view, clearly within the constitutional prohibitions. We conclude that subsection 2 is in conflict with the Missouri Constitution and cannot be given effect. It is further our view, in light of Cleaveland, that none of the provisions of Section 476.515 can be constitutionally applied to the remarried surviving spouse of a judge who ceased to hold office prior to the amendment of that section even though the remarriage occurs after October 1, 1984. See also, State ex rel. Sanders v. Cervantes, 480 S.W.2d 888 (Mo.Banc 1972).

Likewise, in State ex rel. Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 571, 576-577 (Mo.Banc 1962), the court indicated that retrospective awards of retirement benefits violated the prohibition against retrospective laws in Article I, Section 13, Missouri Constitution. See Opinion No. 82-84.

CONCLUSION

It is the opinion of this office that Section 476.515.2 of S.C.S.H.C.S.H.B. 1370, Eighty-Second General Assembly, Second Regular Session, which provides for benefits for surviving spouses of judges who have remarried and who were not eligible for such benefits prior to the amendment of Section 476.515, is unconstitutional and cannot be given effect. Furthermore, Section 476.515 may not be applied to a surviving spouse of a judge who remarried after October 1, 1984, if the deceased judge ceased to hold office prior to that date.

Very truly yours,



JOHN ASHCROFT
Attorney General

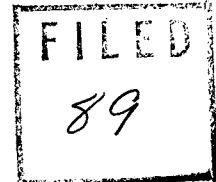
AGRICULTURAL LAND:
ALIENS

A Missouri citizen may use a loan acquired from a non resident alien to buy Missouri farm land when the loan is secured by a deed of trust. In the event of foreclosure, however, the trustee may not convey title to the alien lender, his agent, trustee, or other fiduciary.

August 1, 1984

OPINION NO. 89-84

The Honorable Patrick Hickey
Representative, District 83
Room 301, Capitol Building
Jefferson City, MO 65101



Dear Representative Hickey:

This opinion is in response to your question asking:

May Missouri citizens use a loan acquired from a non-resident alien to buy Missouri farm land when the loan is secured by a deed of trust on such Missouri farm land and when the statutes prohibit a non-resident alien from owning such farm land?

Your questions relate to sections 442.560, 442.566(1) and (2) and 442.571, RSMo 1978.¹ These sections provide:

442.560.--Except as provided in sections 442.560 to 442.591, persons not citizens of the United States and not residents of the United States or of some territory, trusteeship, or protectorate of the United States, and corporations not created by or under the laws of the United States or of some state, territory, trusteeship, or protectorate of the United States shall be capable of acquiring, by grant,

¹All statutory references are to RSMo 1978, unless otherwise indicated.

The Honorable Patrick Hickey

purchase, devise or descent, real estate except agricultural land as defined in section 442.566, or any interest therein, in this state, and of owning, holding, devising, or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this state.

442.566.--As used in sections 442.560 to 442.591, unless the context clearly requires otherwise, the following terms mean:

(1) **"Agricultural land"**, any tract of land in this state consisting of more than five acres, whether inside or outside the corporate limits of any municipality, which is capable, without substantial modification to the character of the land, of supporting an agricultural enterprise, including but not limited to land used for the production of agricultural crops or fruit or other horticultural products, or for the raising or feeding of animals for the production of livestock or livestock products, poultry or poultry products, or milk or dairy products. Adjacent parcels of land under the same ownership shall be deemed to be a single tract;

(2) **"Alien"**, any person who is not a citizen of the United States and who is not a resident of the United States or of some state, territory, trusteeship, or protectorate of the United States;

442.571.--1. Except as provided in sections 442.586 and 442.591, no alien or foreign business shall acquire by grant, purchase, devise, descent or otherwise agricultural land in this state. No person may hold agricultural land as an agent, trustee, or other fiduciary for an alien or foreign business.

2. Any alien or foreign business who acquires agricultural land in violation of sections 442.560 to 442.591 remains in violation of sections 442.560 to 442.591 for as long as he holds an interest in the land.

We construe the term "farm land" in your request to mean "agricultural land" as defined above.

The Honorable Patrick Hickey

With respect to the nature of a deed of trust we find the following:

Notwithstanding a few attributes that still inhere in it as a result of its common-law origin, a mortgage, or deed of trust in the nature of a mortgage, given on land to secure the payment of a debt, is now regarded in this state as being, in its last analysis, a lien and nothing more. [Citations omitted.] So viewed, it is neither an estate in land, nor a right to any beneficial interest therein. It is neither jus in re nor jus ad rem. It is merely the right to have the debt, if not otherwise paid, satisfied out of the land. The debt is the essence of the mortgage, the lien a mere incident that follows it as a shadow. . . (Emphasis added.)

Missouri Real Estate & Loan Co. v. Gibson, 282 Mo. 75, 220 S.W. 675, 676 (1920). See also, Fincher v. Miles Homes of Missouri, Inc., 549 S.W.2d 848, 851-852 (Mo. banc 1977).

Given the preceding, it is our opinion that neither Section 442.560 nor Section 442.571 is violated should a Missouri citizen purchase Missouri farm land with a loan acquired from a non-resident alien, even if the loan is secured by a deed of trust on such farm land.

However, because of Sections 442.560 and 442.571, the alien lender may not acquire an interest in the farm land, in the event of foreclosure, by trustee's deed or otherwise. He may not buy the land upon foreclosure directly or through an agent, trustee or other fiduciary.

Conclusion

It is the opinion of this office that a Missouri citizen may use a loan acquired from a non resident alien to buy Missouri farm land when the loan is secured by a deed of trust. In the event of foreclosure, however, the trustee may not convey title to the alien lender, his agent, trustee or other fiduciary.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

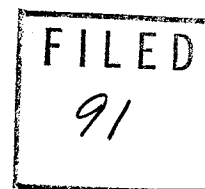
(314) 751-3321

DIRECT DIAL:

August 23, 1984

OPINION LETTER NO. 91-84

Mr. Homer E. Sayad, President
St. Louis Board of Police Commissioners
1200 Clark Avenue
St. Louis, Missouri 63103



Dear Mr. Sayad:

This letter is in response to your opinion request asking the following questions:

May a member of the St. Louis Board of Police Commissioners be employed by the St. Louis Housing Authority as the Director of Social Services and simultaneously retain his commission on the Board of Police Commissioners? (The Director of Social Services receives compensation for serving in such capacity.)

May a member of the Board of Police Commissioners serve as a member of the Museum Zoo District Board of Directors after his appointment to the Board of Police Commissioners? (Assume that the Commissioner was appointed to the Police Board after he was appointed to the Museum Zoo Board of Directors.) (A director of the Museum Zoo District Board receives no compensation for serving in such capacity.)^{1/}

Your question concerns the interpretation of Section 84.080, RSMo 1978, which provides as follows:

1/

We note that Section 84.020, RSMo 1978, makes the Mayor of the City of St. Louis an ex officio commissioner on the St. Louis Board of Police Commissioners. We assume for purposes of this opinion that neither of the commissioners in question are ex officio commissioners.

Mr. Homer E. Sayad

Any one of said commissioners, who, during his term of office, shall accept any other place of public trust or emolument, or who, during the same period, shall knowingly receive any nomination for an office elective by the people, without publicly declining same within twenty days succeeding such nomination, or shall become a candidate for the nomination for any office at the hands of any political party, shall be deemed to thereby forfeit or vacate his office. Any of said commissioners may be removed by the governor of the state of Missouri upon his being fully satisfied that the commissioner is guilty of any official misconduct. [Emphasis added].

The municipal housing authority to which you refer is provided for under Sections 99.010 to 99.230, RSMo 1978 and Supp. 1983. The St. Louis Housing Authority was established by city ordinance and the Housing Authority commissioners are appointed and serve four-year staggered terms. See Sections 99.040 and 99.050, RSMo 1978. There seems to be no doubt that the Housing Authority is a municipal corporation. See St. Louis Housing Authority v. City of St. Louis, 361 Mo. 1170, 239 S.W.2d 289, 294 (Mo. banc 1951).

It is our view that Section 84.080, RSMo 1978, prohibits a police commissioner of the City of St. Louis from accepting "any other place of public trust" or public "emolument". The term "public trust" appears to be somewhat broader than the term "public office". It has been held that the term "public trust" appears to include every agency in which the public, reposing special confidence in particular persons appoints them for the performance of some duty or service and, therefore, the language includes every public officer. Conley v. State, 46 Neb. 187, 64 N.W. 708, 710 (1895).

However, in view of the conclusion we reach here, it is unnecessary for us to determine whether the position to which you refer, Director of Social Services, is a position of public trust within the meaning of Section 84.080, RSMo 1978. As we have noted, such section also prohibits the acceptance of any public emolument. "Emolument" has been defined as profit from office employment or labor with the payment being made out of public funds. State Board of Charities and Corrections v. Hays, 190 Ky. 147, 227 S.W. 282, 287 (1921). In our view, the employment of such a member of the St. Louis Board of Police Commissioners as Director of Social Services of the St. Louis Housing Authority

Mr. Homer E. Sayad

for compensation is the acceptance of a public emolument within the prohibition of Section 84.080, RSMo 1978.^{2/}

Your second question differs from the first in that the assumption is that the Commissioner was appointed to the Police Board after he was appointed to the Museum Zoo Board of Directors and receives no compensation or other remuneration as a Museum Zoo Board Director.

The Museum Zoo Board of Directors is established pursuant to Sections 184.350 to 184.384, RSMo 1978 and Supp. 1983. The district organization is somewhat similar to that of the Housing Authority about which we commented above. The Museum Zoo District Board is appointed pursuant to the provisions of Section 184.354, RSMo 1978. Its members serve without compensation.

Because Museum Zoo Board members do not receive any compensation or other remuneration for their services, Museum Zoo Board members do not accept "other public emoluments" for purposes of Section 84.080, RSMo 1978. A member of a Zoo Board holds a place of public trust, as explained supra. However, in this instance, the Zoo Board membership was accepted prior to the occupancy of the office of police board commissioner. Accordingly, the provisions of Section 84.080, RSMo 1978, do not apply.

Missouri also recognizes the common-law rule that one cannot, while occupying one public office, accept another office that is incompatible with the first office accepted. State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 637 (banc 1896).

An examination of Sections 184.350 to 184.384, RSMo 1978 and Supp. 1983, and Sections 84.010 to 84.340, RSMo 1978 and Supp. 1983, shows that the Police Board and the Museum Zoo Board are distinct and separate entities, and that Police Board and Museum Zoo Board members have no conflicting duties. We believe there

^{2/} As is our custom, we solicited the views of affected persons on the questions raised prior to issuing this opinion. The Police Commissioner to whom the first question applies stated that he could perceive no conflict of interest in his position as a Police Commissioner and his position as the Director of Social Services for the St. Louis Housing Authority. We have no reason to dispute his conclusion as to the presence or absence of a conflict of interest. Nevertheless, in our view the General Assembly has created an irrebuttable presumption of disqualification upon the acceptance of a public emolument by a Police Commissioner; the actual presence of a conflict of interest is, therefore, irrelevant to the question.

Mr. Homer E. Sayad

is no common-law incompatibility between the offices of Museum Zoo Board member and Police Board member.

Accordingly, we believe a member of the Museum Zoo Board may accept the office of St. Louis Police Board Commissioner.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", followed by a horizontal line.

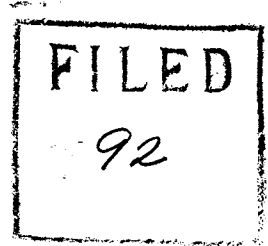
JOHN ASHCROFT
Attorney General

DEPARTMENT OF PUBLIC SAFETY: Water patrolmen have the authority to set up sobriety check points for investigatory stops to determine if boat operators are intoxicated during both daylight and night-time hours, provided that patrolmen do not board any boat for that purpose during night-time hours. Water patrolmen also have the authority to ask boat operators for certificates of registration and to make arrests for equipment violations determined through observation at sobriety checks conducted during night-time hours.

July 13, 1984

OPINION NO. 92-84

Edward D. Daniel, Director
Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65102



Dear Mr. Daniel:

This official opinion is issued in response to your following inquiries:

1. Does the Missouri State Water Patrol have the authority to set up sobriety check points for investigatory stops to determine if the boat operator is intoxicated? All stops are made in a systematic order.
2. If so, does this authority also extend to night-time hours?
3. At sobriety checks during night-time hours, does a water patrol officer have the authority to ask for the certificate of registration for the boat?
4. Does a Water Patrol Officer have the authority to make arrests for equipment violations determined through observation at the time of the sobriety check if this check is during night-time hours?

In Opinion No. 124, Wilson, 1979, copy enclosed, this office concluded that water patrolmen could not randomly and arbitrarily

Edward D. Daniel

stop a watercraft without reasonable suspicion in order to inspect that boat for compliance with Chapter 306, RSMo, regulations, but that water patrolmen may set up an inspection check point for inspection of watercraft. This office's 1979 opinion was based on the Fourth Amendment analysis of the United States Supreme Court in Delaware v. Prouse, 440 U.S. 648, 99 St. Ct. 1391, 59 L.Ed.2d 660 (1979), which is developed at length in the 1979 opinion. The conclusion of this office in the 1979 opinion that inspection check points are permissible has firm support in the governing case law. See United States v. Villamonte-Marquez, 103 S.Ct. 2573, 2579, 2582 (1983), and cases cited therein. With regard to the specific matter of sobriety check point stops, Section 306.110.2, RSMo 1978,^{1/} states that "[n]o person shall operate any motorboat or vessel . . . while intoxicated or under the influence of any narcotic drug, barbiturate or marijuana." Moreover, Section 306.200 authorizes any "peace officer" of the State of Missouri to enforce the provisions of Chapter 306, RSMo, and to arrest persons who violate those provisions. Under Section 306.165, water patrolmen have all the powers of a peace officer to enforce the laws of this state except for search and seizure. As explained on pages seven and eight of this office's 1979 opinion, the search and seizure prohibition enunciated in Section 306.165 does not bar water patrolmen from inspecting boats to determine compliance with the provisions of Chapter 306, RSMo, so long as particular items are not seized from aboard the boats. In sum, systematic sobriety check points for investigatory stops do not violate either the Constitution or Chapter 306, RSMo, and the Missouri State Water Patrol has authority to set up and operate such check points.

In response to your second inquiry asking whether the authority of water patrolmen to set up sobriety check points extends to night-time hours, this office points out that there is no constitutional road block to setting up or maintaining checkpoints at night. Delaware v. Prouse, *supra*, in fact involved a detention of a vehicle at night. 440 U.S. at 650. Thorough research of the case law has yielded only one case that discussed the constitutional import of night-time, as opposed to daytime, inspections. In that case, United States v. Ortiz, 422 U.S. 891, 894 (1975), the Supreme Court, in distinguishing permissible checkpoint stops from more intrusive roving-patrol stops, stated that "[r]oving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists." The fear on the part of motorists that concerned the Supreme Court in Ortiz is, of course, not a material issue, if an issue at all, in the case of much less discretionary inspection check point stops, where "the motorist can see that other vehicles are being stopped, he can see visible signs of the

^{1/}

All statutory references are to RSMo 1978, unless otherwise indicated.

Edward D. Daniel

officers' authority, and he is much less likely to be frightened or annoyed by their intrusion." Delaware v. Prouse, supra at 657 (quoting Ortiz, 442 U.S. at 894-895). Thus, night-time sobriety inspection checks do not run afoul of the Constitution. Our inquiry, however, must also address any applicable statutory provisions.

Section 306.165 states in part: "Each water patrolman may board any boat during daylight hours for the purpose of making any inspection necessary to determine compliance with the provisions of this chapter." (Emphasis added.) The quoted language clearly shows that water patrolmen may not board boats for inspections during night-time hours. It is our understanding that the sobriety inspection checks would not entail boarding inspected boats. Thus, the statutory limitation in question would not bar the sobriety inspection checks. In sum, provided that water patrolmen do not board the boats they inspect, there is no constitutional or statutory bar to inspection checks conducted during night-time hours.

The responses to your third and fourth inquiries are also in the affirmative. Section 306.030.1 mandates that the owner of each vessel requiring numbering by this state to register his vessel by filing an application for number with the Missouri Department of Revenue. Upon receipt of the application in approved form, the Department of Revenue issues to the applicant a certificate of number stating the number awarded to the vessel, and a certificate of title, both of which state the name and address of the owner and the factory number or serial number of the vessel. Section 306.100 sets out the equipment requirements for watercraft. Section 306.100.13 prohibits any person from operating a vessel which is not equipped as required by Section 306.100. As previously pointed out, Section 306.200 grants water patrolmen the authority to enforce all provisions of Chapter 306, RSMo, and to arrest violators thereof. Accordingly, water patrolmen may ask for boat operators' certificates of registration during both daylight and night-time hours, with the proviso again that no boarding take place during night-time hours to determine whether operators are in compliance with Section 306.030.1. Similarly, water patrolmen may make arrests for observed equipment violations at night if they do not board boats to check for equipment violations. In general, water patrolmen may arrest for any violation of Chapter 306, RSMo, so long as their inspections during night-time hours do not entail boarding any boat. Finally, although Section 306.165 prohibits boarding a boat for the purpose of making an inspection at night, the boarding of a boat at night to effect an arrest for violations of Chapter 307, RSMo, that have already been observed is permissible. Section 306.200.

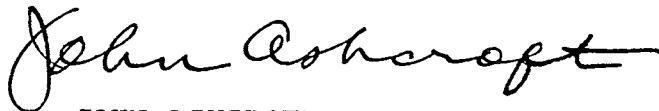
Edward D. Daniel

CONCLUSION

It is the opinion of this office that water patrolmen have the authority to set up sobriety check points for systematically ordered stops to determine if boat operators are intoxicated during both daylight and night-time hours, provided that patrolmen do not board any boat for that purpose during night-time hours. Water patrolmen also have the authority to ask boat operators for certificates of registration and to make arrests for equipment violations determined through observation at sobriety checks conducted during night-time hours.

This opinion, which I hereby approve, was written by my assistant, Frank Rubin.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT
Attorney General

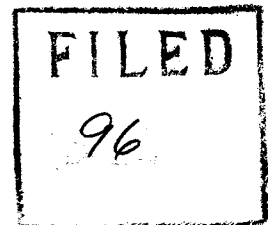
Enclosure: Opinion No. 124, Wilson, 1979

CONSTITUTIONAL AMENDMENT: Legal notices of elections on
ELECTIONS: proposed constitutional amendments
LEGAL NOTICES: should be published for four (4)
 consecutive weeks in counties
having but one newspaper, as is specified in Article XII, Section
2(b), Missouri Constitution.

June 11, 1984

OPINION NO. 96-84

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building, Room 209
Jefferson City, Missouri 675101



Dear Mr. Kirkpatrick:

This opinion is in response to your question asking whether legal notices of proposed constitutional amendments must be published for two (2) consecutive weeks or four (4) consecutive weeks if there is but one (1) newspaper in the county.

Article XII, Section 2(b), Missouri Constitution, states:

All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments. No such proposed amendment shall contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith. If possible, each proposed amendment shall be published once a week for two consecutive weeks in two newspapers of different political faith in each county, the last publication to be not more than thirty nor less than fifteen days next preceding the election. If there be but one newspaper in any county, publication for four consecutive weeks shall be made. If a majority of the votes cast thereon is in favor of any amend-

The Honorable James C. Kirkpatrick

ment, the same shall take effect at the end of thirty days after the election. More than one amendment at the same election shall be so submitted as to enable the electors to vote on each amendment separately. [Emphasis added.]

Section 116.260, RSMo Supp. 1983, states:

The secretary of state shall designate in what newspaper or newspapers in each county the text of statewide ballot measures shall be published. Each shall be published once a week for two consecutive weeks in two newspapers in each county, the first publication to be not more than twenty-one days and the last publication not less than five days next preceding the election. If there is but one newspaper in any county, publication for two consecutive weeks shall be made, the first publication to be not more than twenty-one days and the last publication not less than five days next preceding the election. [Emphasis added.]

The predecessor of Article XII, Section 2(b), Missouri Constitution (Article XV, Section 2, Missouri Constitution (1875)), was interpreted as requiring substantial compliance with its provisions. State ex rel. State Building Commission v. Smith, 335 Mo. 840, 74 S.W.2d 27 (banc 1934); Fahey v. Hackmann, 291 Mo. 351, 237 S.W. 752 (banc 1922) (publication by Pettis County of election notice for three weeks, instead of the four weeks required, did not invalidate election).

In State ex rel. Board of Fund Commissioners v. Holman, 296 S.W.2d 482 (Mo. banc 1956), the court noted the introduction of the words "if possible" into Article XII, Section 2(b), Missouri Constitution. The court noted that generally "the provisions of a constitution regulating its own amendment are mandatory and not directory." 296 S.W.2d at 495. The court then stated that the use of the term "if possible" tended to destroy the definite, absolute, and mandatory character of the provision as it existed in Article XV, Section 2, Missouri Constitution (1875). This language introduced reasonableness, practicality, judgment and discretion in the matter of compliance. The "if possible" language was a recognition of the possibility of failure through negligence, incompetency, accident, mistake, inadvertence or wilful misconduct by election officials or newspapers. 296 S.W.2d at 496.

The Honorable James C. Kirkpatrick

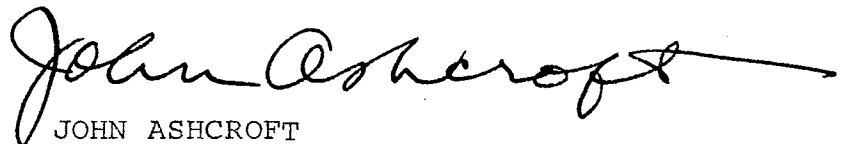
In light of this interpretation of the words "if possible", we do not believe that these words authorize the General Assembly to specify publication requirements that are inconsistent with those specified in Article XII, Section 2(b), Missouri Constitution.

Statutes are presumed constitutional and will be held otherwise only if they clearly contravene some constitutional provision. State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69 (Mo. banc 1982). In this instance, we believe that the two (2) week publication requirement in counties having but one (1) newspaper in Section 116.260, RSMo Supp. 1983, clearly contravenes the four (4) week publication requirement for such counties in Article XII, Section 2(b), Missouri Constitution. Therefore, legal notices of proposed constitutional amendments should be published for four (4) consecutive weeks in counties having but one newspaper; i.e., the Constitution should be followed.^{1/}

CONCLUSION

It is the opinion of this office that legal notices of elections on proposed constitutional amendments should be published for four (4) consecutive weeks in counties having but one newspaper, as is specified in Article XII, Section 2(b), Missouri Constitution.

Very truly yours,



JOHN ASHCROFT
Attorney General

^{1/}

We note that Section 116.260, RSMo Supp. 1983, may cause some confusion as to the correct number of weeks legal notices of proposed constitutional amendments need to be published. We believe that the "if possible" language of Article XII, Section 2(b), Missouri Constitution, will act as a "savings clause" in the event some of the legal notices are inadvertently published for two (2) consecutive weeks in counties having but one newspaper, as is specified in Section 116.260, RSMo Supp. 1983.

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

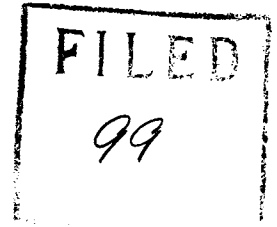
(314) 751-3321

July 3, 1984

DIRECT DIAL:

OPINION LETTER NO. 99-84

The Honorable Patrick Hickey
Representative, District 83
State Capitol Building
Jefferson City, Missouri 65101



Dear Representative Hickey:

This opinion is in response to your questions asking:

A. Additional compensation for an additional duty is not a violation of Article VII, Section 13 of the Missouri Constitution, which prohibits an increase in an officer's compensation during his term of office. For purposes of Article III, Section 12 of the Missouri Constitution are the emoluments of an appointive office increased if the General Assembly enacts legislation providing additional compensation for a specified additional duty for the appointive office?

B. Can a member of the General Assembly elected to a term beginning January 1983 accept an appointment from the Governor to the Labor and Industrial Relations Commission prior to the end of his term as a member of the General Assembly where the compensation as a Commissioner will be determined pursuant to Section 286.006 of House Substitute for Senate Bill No. 528, as enacted by the 82nd General Assembly?

A.

Article VII, Section 13, Missouri Constitution, states:

The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.

The Honorable Patrick Hickey

The purpose of Article VII, Section 13, Missouri Constitution, is:

"[T]o prevent persons while possessed of the prestige and influence of official power from using that power for their own advantage. . . ."

State ex rel. Scobee v. Meriwether, 355 Mo. 1217, 1219, 200 S.W.2d 340, 341 (banc 1947) (quoting, Folk v. City of St. Louis, 250 Mo. 116, 135, 157 S.W. 71, 74 (1913)).

Consistent with the stated purpose of this constitutional provision, the courts have indicated that the compensation of officers may be increased during their terms if such is compensation for the performance of new and additional duties not ordinarily germane to the office. Mooney v. County of St. Louis, 286 S.W.2d 763, 766 (Mo. 1956); Little River Drainage Dist. v. Lassater, 325 Mo. 493, 502, 29 S.W.2d 716, 719 (1930).

Article III, Section 12, Missouri Constitution, states:

No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public.

(Emphasis added.)

In Opinion Letter No. 355, Salveter, 1969, the purpose of Article III, Section 12, Missouri Constitution, was stated to be the prevention of "the potential conflicts of interest which would arise if a senator or representative were to have other duties with respect to other governmental bodies," Id., at 2. Likewise, in Opinion No. 175, Noland, 1975, at 3-4, and Opinion No. 88, Gant, 1973, at 4, Mr. McReynolds, who handled the file of what became Article III, Section 12, Missouri Constitution, was quoted as follows:

[A] practice has grown up in the General Assembly where members of the General Assembly

The Honorable Patrick Hickey

have, in the past accepted employment from the state and since they are called upon to vote upon appropriations and other matters which affect the policy of the particular departments, it was felt that a proper safeguarding of the rights of the departments and of the state in protection of itself and its interest should disqualify the members of the General Assembly from holding office of that kind or accepting employment or remuneration of that kind. . . .

15 Debates of the 1943-1944 Constitutional Convention of the State of Missouri 4720.

Unlike the situation under Article VII, Section 13, Missouri Constitution, no appellate authority in Missouri has grafted the "additional duties" exception onto Article III, Section 12, Missouri Constitution, and for good reason. The "potential conflicts of interest" that exist when a state senator or state representative occupies another governmental office that receives pay increases granted by the General Assembly in which that senator or representative served is not cured by the addition of new duties to the other governmental office. Accordingly, we must conclude that the emoluments of an office are increased for purposes of Article III, Section 12, Missouri Constitution, if the General Assembly enacts legislation providing additional compensation for a specified additional duty for the appointive office.

B.

Information known to us shows the following with regard to the second question asked: That the Second Regular Session of the Eighty-~~Second~~ General Assembly passed House Substitute for Senate Bill No. 528 (hereinafter sometimes referred to as "S.B. 528"); that Section 286.005 of S.B. 528 increases the salary of members of the Labor and Industrial Relations Commission from \$40,000 per annum to \$57,500 per annum plus an annual salary adjustment computed pursuant to Section 2 of S.B. 528;¹ that Section 286.006.1 of S.B. 528 imposes upon the Labor and Industrial Relations Commission the duty to "review any claim for benefits made under the provisions of the compensation to victims of crime law, as provided in chapter 595, RSMo."; that Section 286.006.2 of S.B. 528 provides that members of the Labor and Industrial Relations Commission who are serving on the effective date of S.B. 528 receive a sum, when added to the other compensation paid to the member prior to the effective date of S.B. 528, that will equal the compensation specified in Section 286.005.1 of S.B. 528 as compensation for

¹For a review of the history of the salaries of members of the Labor and Industrial Relations Commission, see State ex rel. Igoe v. Bradford, 611 S.W.2d 343 (Mo. App. 1981).

The Honorable Patrick Hickey

the performance of the additional duty imposed by Section 286.006.1 of S.B. 528; that Sections 286.005 and 286.006 of S.B. 528 will become effective August 13, 1984; that the term of Herbert L. Ford as a member of the Labor and Industrial Relations Commission expires on June 27, 1984; and that the Governor will appoint Mr. Ford's successor in office pursuant to Article IV, Sections 49 and 51, Missouri Constitution.

You ask whether the Governor may appoint a member of the Second Regular Session of the Eighty-Second General Assembly of the State of Missouri to be Mr. Ford's successor on the Labor and Industrial Relations Commission.

As stated above, the emoluments of the appointive office of member of the Labor and Industrial Relations Commission were increased during the Second Regular Session of the Eighty-Second General Assembly. Accordingly, we conclude that Article III, Section 12, Missouri Constitution, prohibits the Governor from appointing a member of the Second Regular Session of the Eighty-Second General Assembly to the office of member of the Labor and Industrial Relations Commission during the term for which such member was elected.

Yours very truly,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

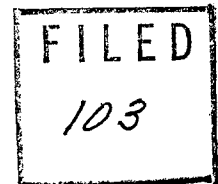
(314) 751-3321

DIRECT DIAL:

August 13, 1984

OPINION LETTER NO. 103-84

The Honorable Carole Roper Park
Representative, District 52
11415 East Gill Street
Sugar Creek, Missouri 64054



Dear Representative Park:

This letter is in response to your request for an opinion of this office asking whether the City of Independence, Missouri, can amend its charter to provide for the regular election of municipal officers on some day other than the first Tuesday in April. We understand that under the present charter provisions the City of Independence holds its primary election on the first Tuesday after the first Monday in February and the general election on the first Tuesday in April commencing in 1980 and every fourth year thereafter. Your question, therefore, requires the determination of whether the provisions of Section 115.121.3, RSMo 1978, (which provides that the municipal election day shall be the first Tuesday in April) control or whether the provisions of Section 115.123, RSMo Supp. 1983, (which authorizes several election days for municipalities) control.

Section 115.121.3 provides:

The election day for the election of political subdivision and special district officers shall be the first Tuesday in April each year; and shall be known as "municipal election day".

Section 115.123 provides:

1. All public elections shall be held on Tuesday. Except bond elections necessitated by fire, vandalism or natural disaster, except elections for which ownership of real property is required by law for voting, except special

elections to fill vacancies and to decide tie votes or election contests, and except as otherwise expressly provided by city or county charter, all public elections shall be held on the general election day, the primary election day, the municipal primary day, municipal general election day, the first Tuesday after the first Monday in February, March, June, August, or November or with an election on another day expressly provided by city or county charter. The election authority of each county shall make the selection of either the February or March election date, but not both dates for the same political subdivision or special district. After January 1, 1978, no city or county shall adopt a charter or charter amendment which calls an election on any day other than the February or March, April, June, August, or November election days specified in this section.

2. Notwithstanding the provisions of subsection 1 of this section, school districts may hold special levy elections on the first Tuesday after the first Monday in October.

These sections were first enacted in the Comprehensive Election Act of 1977, S.S.H.B. 101, Laws of Missouri, 1977, pp. 207 et seq., as Sections 6.001 and 6.005, p. 229. Although both sections have since been amended, and the latest amendment pertains to Section 115.123, the substantive provisions remain similar to those originally enacted. Therefore, it is our view that the sections have to be read together.

Clearly, Section 115.121.3 provides that the municipal election day will be on the first Tuesday in April. It is also clear that Section 115.123 provides that certain elections may be held on other specified days. Since Section 115.121 mandates the regular election of municipal officers on the first Tuesday in April, Section 115.123 cannot be read to allow the regular election of municipal officers on any other day. Any interpretation of Section 115.123 which would conflict with Section 115.121 would be inappropriate.

Section 115.121 of the Comprehensive Election Act is of state-wide application. See Section 115.005, RSMo 1978. Since it expresses a legislative mandate which applies to all political subdivisions, it applies to constitutional charter cities which amend their charter election dates. Cf. Cohen v. Poelker, 520 S.W.2d 50, 54 (Mo. banc 1975).

The Honorable Carole Roper Park

We conclude that cities, including constitutional charter cities amending their charter election dates, must hold their regular election of officers on the first Tuesday in April and their municipal primary elections in February or March as selected by the election authority.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized font.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

August 2, 1984

(314) 751-3321

DIRECT DIAL:

Opinion Letter No. 107-84

John A. Pelzer
Commissioner of Administration
Office of Administration
Post Office Box 809
Jefferson City, Missouri 65102



Dear Mr. Pelzer:

This letter is in response to your request for an opinion of this office asking whether library networks which receive state funds under Section 182.812, RSMo Supp. 1983, are instrumentalities of the state for the purposes of Sections 105.300.7, RSMo Supp. 1983, and 105.350.1, RSMo 1978, relating to plans for the extending of social security benefits to employees of political subdivisions.

Section 182.812 provides as follows:

1. As used in this section, the term "library network" shall mean [sic] a formal organization of different types of libraries which is created to serve the constituencies of the participating libraries in an improved fashion through planning and implementing projects and join activities designed to share and extend combined resources.

2. Each library network shall certify to the state librarian, through its board of directors, the plan for its establishment, along with such other information as the state librarian deems necessary. No library network shall be eligible for state funds under this section until its establishment has been approved by the coordinating board for higher education.

3. The state librarian shall, under rules and regulations of the coordinating board for

John A. Pelzer

higher education, administer any moneys appropriated by the general assembly for state aid to library networks. The sum so appropriated for state aid to library networks shall be separate and apart from any and all appropriations made to the state library for any other purpose. The state librarian shall certify to the coordinating board for higher education for its approval the amount of each grant to each approved library network, and warrants shall be issued for the amount so allocated and approved.

4. Each library network receiving moneys under the provisions of this section shall submit annually to the state librarian, no later than the last day of the fiscal year in which such moneys were received, a report giving an accounting of activities and expenditures of funds during such years.

5. In the event that the general assembly does not appropriate sufficient funds to fully fund all library networks eligible for aid under this section, the amount which has been appropriated shall be distributed pro rata to each eligible library network. Each eligible library network's pro rata share shall be that percentage which that network's grant, as approved by the coordinating board, bears to the total amount of all grants approved by the coordinating board for all networks, but in no event shall it exceed the grant approved by the coordinating board.

It seems clear from the provisions of Section 182.812 that a "library network" is a formal organization of different types of libraries created for the purposes of that section. We understand that such networks often include both public and private libraries and are sometimes organized as not-for-profit corporations.

We conclude that such a network is neither a political subdivision of the state nor an instrumentality of the state or of one or more political subdivisions of the state within the provisions of Sections 105.300.7 and 105.350.

Therefore, such library networks may not report their social security taxes through the Office of Administration.

Very truly yours,



JOHN ASHCROFT
Attorney General

The Honorable James C. Kirkpatrick

Article III, Section 50, Missouri Constitution (1945), provides in pertinent part:

Initiative petitions proposing amendments to the constitution shall be signed by eight percent of the legal voters in each of two-thirds of the congressional districts in the state, and petitions proposing laws shall be signed by five percent of such persons. . . . (Emphasis added.)

Section 116.060, RSMo Supp. 1983,^{2/} provides:

Any registered voter of the state of Missouri may sign initiative and referendum petitions. However, each page of an initiative or referendum petition shall contain signatures of voters from only one county. . . . (Emphasis added.)

Section 1.035, RSMo 1978, states: "Whenever the word 'voter' is used in the laws of this state it shall mean registered voter, or legal voter." See also, Scott v. Kirkpatrick, 513 S.W.2d 442 (Mo. banc 1974).

Section 115.165.4 states:

Any registered voter who changes his place of residence within a jurisdiction at or before 5:00 p.m. on the fourth Wednesday prior to an election and does not transfer his registration at or before 5:00 p.m. on the fourth Wednesday prior to the election shall not be entitled to vote in the election.^{3/}

(footnote continued from previous page)

If a person is found to be registered, and at the address shown on the petition, place a RED "R" in the left margin next to the signature. [Emphasis in original].

^{2/}

Unless otherwise noted, all statutory references are to RSMo. Supp. 1983.

^{3/}

We are aware of the provisions of Section 115.165 which creates an exception for registered voters who change their place of residence within a jurisdiction after 5:00 p.m. on the fourth Wednesday prior to an election by allowing such voters to complete an application for transfer at the polling place of their previous

The Honorable James C. Kirkpatrick

In essence, you seek our opinion as to whether the phrase "registered voter" as found in Chapter 116 and "legal voter" as found in Article III, Section 50, include persons who are not presently eligible to cast votes in an election pursuant to Section 115.165.4. For the reasons hereinafter stated, it is our opinion that persons who are not eligible to cast votes are not "registered voters" for purposes of Section 116.060 nor are they "legal voters" for purposes of Article III, Section 50.

In Scott v. Kirkpatrick, supra, our Supreme Court determined that the phrase "legal voter" as used in Article III, Section 50, is essentially synonymous with the phrase "registered voter". In so holding, the court stated:

[U]nless a person is registered he is not at any time legally entitled to vote.

* * *

It follows from this that the signature of a person otherwise qualified, but not registered, to vote is not acceptable on an initiative petition proposing an amendment to the constitution, because he is not at the time legally entitled to vote on the measure it proposes. (Emphasis added.) Id. at 445.

See also, Section 1.035; United Labor Committee of Missouri v. Kirkpatrick, 572 S.W.2d 449, 452 (Mo. banc 1978).

On the same day it decided Scott, the Supreme Court issued its decision in Socialist Workers' Party of Missouri v. Kirkpatrick, 513 S.W.2d 346 (Mo. banc 1974). There, the Court determined that the phrase "qualified voter" was synonymous with the phrase "registered voter". The court stated, quoting with approval 29 C.J.S. Elections, Section 1(8), 23, stated:

A "qualified voter" is one having the constitutional qualifications for the privilege, who is duly registered pursuant to law, and

(footnote continued from previous page)

address on election day. We are also cognizant of the provisions of Section 115.277.4 which provide that registered voters who move from one jurisdiction in the state to another jurisdiction in the state after the close of registration in their new place of residence may cast an absentee ballot for certain elected officials and "statewide questions, propositions and amendments" without being registered in their new jurisdiction of residence. However, under the fact situation you have outlined, these statutory exceptions are not applicable.

The Honorable James C. Kirkpatrick

has the present right to vote at the election
being held. (Emphasis added.)

In State ex rel. Hay v. Flynn, 147 S.W.2d 210, 211 (Mo. App. 1941), the Court stated:

The primary purpose of registration laws is to prevent fraudulent abuse of the franchise, by providing in advance of elections an authentic list of qualified voters. [Emphasis added].

Reading Scott, Socialist Workers' Party, United Labor Committee of Missouri and Flynn together, we arrive at the conclusion that for purposes of Missouri law, a legal voter is a person who is properly registered to vote and who possesses a present, legal ability to vote.

In the fact situation you pose, 670 persons signed an initiative petition at an address different than that at which they are registered. According to the Greene County Clerk, and pursuant to Section 115.165.4, at the time these persons signed the initiative petition, they were not eligible to cast votes in Greene County. See, Scott v. Kirkpatrick, supra at 445. Therefore, such persons are neither registered voters for purposes of Section 116.060 nor legal voters for purposes of Article III, Section 50.

This conclusion is consistent with appellate decisions of other states which have determined the meaning of the phrase "legal voter". In Opinion of the Justices, 230 N.E.2d 801, 806 (Mass. 1967), the Supreme Judicial Court of Massachusetts noted that the phrase "legal voter" describes voters who:

[P]ossess the qualifications prescribed by the constitution for voters and who have complied with the statutory requirements so that they may lawfully cast votes at an election.

Id. at 806. See also, Opinion of the Justices, 143 N.E. 142, 144 (Mass. 1924). Similarly, the phrase "registered voter", has been defined, in Citizens for Charter Change in Essex County v. Caputo, 376 A.2d 1248 N.J. App. 1977, as a person who is presently qualified to vote.

The Honorable James C. Kirkpatrick

CONCLUSION

It is the opinion of this office that persons who sign an initiative petition showing an address different than that at which they were formerly registered are not "legal voters" for purposes of Article III, Section 50, Missouri Constitution (1945), nor are they "registered voters" for purposes Section 116.060, RSMo Supp. 1983.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", followed by a horizontal line.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

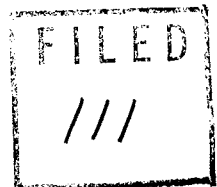
(314) 751-3321

DIRECT DIAL:

August 27, 1984

OPINION LETTER NO. 111-84

The Honorable Harry Hill
Representative, District 2
Rural Route 1
Novinger, Missouri 63559



Dear Representative Hill:

This letter is in response to your question asking whether the provisions of Section 78.630, RSMo 1978, require that an ordinance granting a 15-year nonexclusive cable television franchise be approved by a majority of the voters voting at a municipal election.

Section 78.630 provides:

1. Except as hereinafter provided, no ordinance or amendment or modification thereof granting any franchise, lease, right or privilege in or under the streets, public thoroughfares or public places of a city operating under sections 78.430 to 78.640 shall go into effect or become operative or vest any right in the grantee or grantees, unless such grants shall first be approved by a majority of the voters voting at a municipal election at which the proposed grant is properly submitted. And no such proposed grant shall be voted on unless the full text thereof [sic].

2. No ordinance or amendment or modification thereof granting any nonexclusive franchise, lease, right or privilege for not to exceed twenty years in or under the streets, public thoroughfares or public places of a city operating under sections 78.430 to 78.640 shall go into effect or become operative or vest any right in the grantee or grantees, except upon prior compliance with the following conditions:

The Honorable Harry Hill

(1) Before final passage of the ordinance, or amendment or modification of ordinance, by the council, the city clerk shall prepare a notice of a public hearing thereupon and cause it, along with a true copy of the ordinance, including the full text of the franchise under consideration, to be published once a week for four consecutive weeks in a daily newspaper or for four consecutive weeks in a weekly newspaper if no daily newspaper is published in the city, the first publication to be at least thirty days before, and the last publication within ten days of, the date fixed by the city council for the public hearing.

(2) The notice shall give the date, time and place of the public hearing, and shall contain a statement of the substance and effect of the proposed ordinance, and a further statement that the ordinance, or amendment or modification of ordinance, as introduced, or a true copy thereof, may be inspected and copied at the office of the city clerk during regular business hours.

(3) The public hearing shall be at a regular, adjourned or called meeting of the city council at which all interested persons will be heard in person or by attorney.

(4) The city council may at any time, before or after the public hearing, submit the proposed franchise, lease, right or privilege to an election by the voters for their approval.

(5) The provisions of this subsection shall not apply in the granting of any franchise, lease, right or privilege to any utility regulated by the public service commission of the state of Missouri.

3. Any ordinance, however, may be amended or modified by the council of any city as to streets, alleys, or public places already occupied and used by any person, persons or corporation by and under a franchise then in existence and only as to such streets, alleys, or public places used and occupied by such person, persons or corporation under a franchise then in existence, when such modifications or amendment is necessary to enable such person or corporation to enlarge, better or improve its facilities, equipment, material, or structure above,

The Honorable Harry Hill

upon or beneath said streets, alleys, public thoroughfares or public places then used and occupied by such person or corporation by and under a franchise then in existence, for the purpose of removing or overcoming hindrances to public service. The city council shall have the right to grant to any railroad company the right to construct switches or spur tracks to industrial plants or warehouses.

We conclude that no vote is required to approve a 15-year non-exclusive cable television franchise under Section 78.630, RSMo 1978, for the following reasons.

First, it is apparent that the last sentence in subsection 1 is incomplete. The mistake appears to have occurred in House Bill No. 971, 1978 Mo. Laws 252, 288-289. The portion of prior subsection 1 which was omitted can be found as enacted in House Bill No. 448, 1963 Mo. Laws 131-132. This omission, which appears to be inadvertent, has some bearing on the analysis of these sections, because the omitted material contained certain provisions relative to publication prior to the election on the franchise. If the election provisions should have been carried on into present subsection 1 as they were in the original amendment in 1963, it would seem that there would be duplication in the publication requirements, because subsection 2, as amended in 1963 and as presently provided, requires certain publication prior to the public hearing. Therefore, if it was intended that subsection 1 have separate publication requirements from the publication requirements contained in subsection 2, that would be indicative that both subsections were to be separately interpreted.

Second, subsection 2 pertains only to nonexclusive franchises not exceeding twenty years. Therefore, subsection 2 appears to relate to something less than does subsection 1, which applies to ordinances or amendments or modifications thereof granting any franchise.

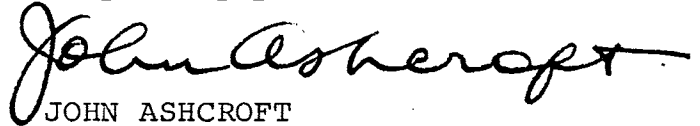
Third, it is clear that Section 78.630, as amended by House Bill No. 448, 1963 Mo. Laws, 131, added the first phrase to subsection 1, "[e]xcept as hereinafter provided" and also added what is now subsections 2 and 3 of such section. Therefore, subsection 1 recognized that certain exceptions to its provisions would follow.

While the amendments to Section 78.630 appear to have omitted crucial language, it seems that the only way the section can be read is to view subsection 2 as an exception to subsection 1. As so construed, nonexclusive franchises for under twenty years appear to be excepted from the provisions of subsection 1. Since subsection 2 does not require a vote, but only makes such a vote optional under subsection 2(4), we conclude that no such vote is required for the approval of a 15-year nonexclusive cable television franchise.

The Honorable Harry Hill

In view of the apparent omission contained in the 1978 Missouri Laws respecting the last portion of subsection 1 and in light of the obvious difficulty in interpreting this section as a whole, we suggest that it is a prime subject for legislative revision.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a horizontal line extending from the end of the signature.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

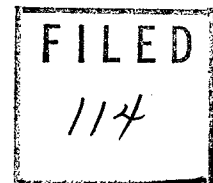
(314) 751-3321

October 18, 1984

DIRECT DIAL:

OPINION LETTER NO. 114-84

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees' Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101



Dear Ms. Hackwood:

This letter is in response to your request for an opinion of this office asking whether the Board of Trustees and the employees of the Missouri State Employees' Retirement System (hereinafter sometimes referred to as "MOSERS") are covered under the State Legal Expense Fund, Sections 105.711 to 105.726, RSMo Supp. 1983. We assume that you are referring to the regular employees of the system.

Section 105.711, RSMo Supp. 1983, provides in pertinent part as follows:

1. There is hereby created a "State Legal Expense Fund" which shall replace the "Tort Defense Fund" and which shall consist of moneys appropriated to the fund by the general assembly and moneys otherwise credited to such fund pursuant to section 105.716.

2. Moneys in the state legal expense fund shall be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against:

(1) The state of Missouri, or any agency thereof, pursuant to section 537.600, RSMo; or

(2) Any officer or employee of the state of Missouri or any agency thereof, including, without limitation, elected officials, appointees, members of state boards or commissions

Mary-Jean Hackwood

and members of the Missouri national guard upon conduct of such officer or employee arising out of and performed in connection with his or her official duties on behalf of the state, or any agency thereof, provided that moneys in this fund shall not be available for payment of claims made under chapter 287, RSMo. [Emphasis added.]

Section 104.320, House Bill No. 1370, 82nd General Assembly, Second Regular Session, provides:

The Missouri state employees' retirement system shall be a body corporate and an instrumentality of the state. In the system shall be vested the powers and duties specified in sections 104.310 to 104.620 and such other powers as may be necessary or proper to enable it, its officers, employees, and agents to carry out fully and effectively all the purposes of sections 104.310 to 104.620.

Section 104.450 of House Bill No. 1370 provides that the Board of Trustees consists of the State Treasurer, the Commissioner of Administration, the Director of the Personnel Division, one member of the Senate, one member of the House, one member appointed by the Governor, and three elected members.

Section 104.460.5, House Bill No. 1370, provides that "[t]he secretary, assistant secretary, and all other employees of the system appointed by the board shall be both state employees and members of the system."

In our Opinion No. 10-81 to MOSERS, we concluded that MOSERS is subject to the provisions of the state purchasing law even though it was removed from the Department of Revenue.

Therefore, it is our view that such officers and employees of MOSERS are within the definitions contained in Section 105.711.2(2), RSMo Supp. 1983, and have the protection provided by the State Legal Expense Fund.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

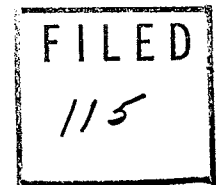
(314) 751-3321

DIRECT DIAL:

August 29, 1984

OPINION LETTER NQ. 115-84

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This letter is in response to your request from this office asking our advice as to whether Judge Robert W. Berrey, III, Judge of the Missouri Court of Appeals, Western District, is required to file his declaration of candidacy for the November 6, 1984, election.

It is our understanding that Judge Berrey was appointed to fill a vacancy on the Missouri Court of Appeals, Western District, on November 3, 1983, by Governor Christopher S. Bond, under the provisions of Section 25(a), Article V, Missouri Constitution, for a term ending December thirty-first, following the next general election after the expiration of twelve months in office. It is also our understanding that Judge Berrey did not take the oath of office or assume office until December 2, 1983.

The tenure of such judges is provided by Section 25(c)(1), Article V, Missouri Constitution, which provides in relevant part as follows:

Each judge appointed pursuant to the provisions of sections 25(a)-(g) shall hold office for a term ending December thirty-first following the next general election after the expiration of twelve months in the office.

. . . Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 25(a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such declaration

The Honorable James C. Kirkpatrick

is filed his name shall be submitted at the next general election to the voters eligible to vote within the state if his office is that of judge of the supreme court, or within the geographic jurisdiction limit of the district where he serves if his office is that of a judge of the court of appeals, If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in Section 25(a); otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December thirty-first following such election as is provided for the full term of such office, and at the expiration of each term shall be eligible for retention in office by election in the manner here prescribed.


Under Section 19, Article V, Missouri Constitution, judges of the Court of Appeals are selected for terms of 12 years.

It seems to us that under the provisions of Section 25(c)(1) such judges appointed to fill a vacancy are not serving the remainder of a term, but, instead are beginning their own term of office as provided by such section. The description of the term in this case in the appointment document uses identically the same language provided in Section 25(c)(1), that is, "a term ending December thirty-first following the next general election after the expiration of twelve months in the office." This language in our view refers to twelve months actual service in the office to which such a judge is appointed.

Under Section 476.280, RSMo 1978, each judge is required to take an oath of office before entering upon the duties of his office. The taking of an oath has been held, in another factual context, necessary to qualify for office. Labor's Educational and Political Club-Independent v. Danforth, 561 S.W.2d 339, 344 (Mo. banc 1978). See also, Section 11, Article VII, Missouri Constitution.

Judge Berrey, we are advised, did not take the oath of office or assume office until December 2, 1983. Accordingly, under the provisions of the Constitution, he would be required to file his declaration of candidacy for election to succeed himself at the general election after the expiration of twelve months in office, said twelve months commencing December 2, 1983. He should not, in our view, file for retention in the 1984 general election.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

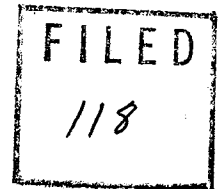
September 10, 1984

(314) 751-3321

DIRECT DIAL:

OPINION LETTER 118-84

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

In response to your letter of September 5, 1984, and pursuant to Section 116.160.2, RSMo Supp. 1983, we have prepared the following ballot title for a statutory measure proposed by the initiative:

Permits charging consumers for certain costs of electrical plants abandoned due to lack of approved waste disposal or other causes; requires certain rate increase deferrals; prohibits certain costs overrun, excess capacity and nuclear plant charges.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

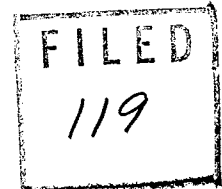
(314) 751-3321

DIRECT DIAL:

October 18, 1984

OPINION LETTER NO. 119-84

The Honorable James W. Murphy
Senator, District 1
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Murphy:

This letter is in response to your question asking whether the medical records of an individual retained by a public governmental body, as defined in Section 610.010(2), RSMo Supp. 1983, are open to inspection under the Sunshine Law, Chapter 610, RSMo 1978 & Supp. 1983.¹

Section 610.015, RSMo 1978, states in part: "Except as provided in section 610.025, and except as otherwise provided by law, . . . public records shall be open to the public for inspection and duplication." Section 610.010(4), RSMo Supp. 1983, defines the term "public record" as "any record retained by or of any public governmental body including . . .;". Section 610.010(2), RSMo Supp. 1983, defines the term "public governmental body".

Medical records retained by a "public governmental body" are "public records" for purposes of the Sunshine Law, and a public right of access exists with regard to them, "[e]xcept as provided in Section 610.025, and except as otherwise provided by law, . . .". Section 610.015, RSMo 1978.

A.

Section 610.025, RSMo Supp. 1983

Section 610.025.3, RSMo Supp. 1983, states in part: "Any non-judicial mental health proceedings and proceedings involving physical

¹In addition to the Sunshine Law, Chapter 610, RSMo 1978 and Supp. 1983, public access to public records is recognized by Sections 109.180 and 109.190, RSMo 1978, and Missouri common law, e.g., Disabled Police Veterans Club v. Long, 279 S.W.2d 220 (Mo. App. 1955). We find it unnecessary to analyze these rights of access, because the question asked deals only with the Sunshine Law.

The Honorable James W. Murphy

health, . . . may be a closed meeting, closed record, or closed vote." (Emphasis added.) The above-quoted statutory language clearly shows that proceedings involving physical health may be closed, but does not state that records involving physical health may be closed. However, in Wilson v. McNeal, 575 S.W.2d 802, 810 (Mo. App. 1978), the court indicated that records of a closed personnel meeting are closed, even if the Sunshine Law does not specifically make personnel records closed. The reasoning being if a meeting is closed, records of that meeting are also closed.

A like situation exists with respect to proceedings involving physical health. If a proceeding involving physical health may be closed, then records of that proceeding may also be closed. Any time a public governmental body wishes to close a record pursuant to Section 610.025, RSMo Supp. 1983, it must conduct a proceeding to authorize such closure. See Section 610.025.5, RSMo Supp. 1983. Thus, medical records may be closed pursuant to Section 610.025.3, RSMo Supp. 1983, after the public governmental body involved votes to close such records pursuant to Section 610.025.5, RSMo Supp. 1983.

B.

Otherwise Provided By Law

According to Section 610.015, RSMo 1978, public records are open, unless, inter alia, it is otherwise provided by law. The "otherwise provided by law" exception to Section 610.015, RSMo 1978, is not subject to the voting and other requirements of Section 610.025.5, RSMo Supp. 1983.

In Opinion Letter No. 11-84 (copy enclosed), this office noted that in Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. App. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 1233 (1983), the court began to expand the "otherwise provided by law" category of records by indicating that records are closed if the individual named in such could maintain a common law tort or other action for the disclosure of the contents of the record. Cf. Disabled Police Veterans Club v. Long, 279 S.W.2d 220, 223 (Mo. App. 1955) (indicating the existence of a "public policy" exception to the common law right of access to public records).

McNally v. Pulitzer Publishing Company, 532 F.2d 69 (8th Cir. 1976), cert. denied, 429 U.S. 855 (1976), discusses various theories of liability for the public disclosure of private information.

Accordingly, we conclude that medical records are closed, regardless of compliance with Section 610.025.5, RSMo Supp. 1983, if the disclosure of such records would give rise to a claim for such disclosure.

The Honorable James W. Murphy

We conclude that:

(1) The medical records of individuals retained by a public governmental body are closed under Section 610.025.3, RSMo Supp. 1983, if a proceeding to close such is conducted pursuant to Section 610.025.5, RSMo Supp. 1983; and

(2) the medical records of individuals retained by a public governmental body are closed, regardless of compliance with Section 610.025.5, RSMo Supp. 1983, if the disclosure of the contents of such records gives rise to a common law tort or other action.

Yours very truly,

A handwritten signature in black ink that reads "John Ashcroft". The signature is written in a cursive, slightly stylized font.

JOHN ASHCROFT
Attorney General

Enclosure: Opinion Letter No. 11-84

INDUSTRIAL DEVELOPMENT CORPORATIONS ACT:
POWERS:
REFINANCING:

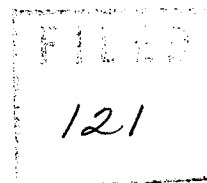
An industrial development corporation organized under the Industrial

Development Corporations Act, Chapter 349 of the Revised Statutes of Missouri, 1978, as amended, has the power and authority to issue revenue bonds and to loan the proceeds therefrom to a corporation for the purpose of refinancing and extinguishing outstanding indebtedness previously incurred by such corporation in connection with the purchase, construction, extension or improvement of a "project" as defined in the Industrial Development Corporations Act.

October 17, 1984

OPINION NO. 121-84

The Honorable Harry Wiggins
Senator, District 10
State Capitol Building, Room 321
Jefferson City, Missouri 65101



Dear Senator Wiggins:

This opinion is in response to your request as follows:

Does an industrial development corporation have the power and authority under Chapter 349 of the Revised Statutes of Missouri, 1978, as amended, to issue revenue bonds and to loan the proceeds derived from the issuance and sale of such bonds to a corporation for the purpose of refinancing and extinguishing outstanding indebtedness previously incurred by such corporation in connection with the purchase, construction, extension or improvement of a "project" as defined in Chapter 349?

The facts which you present to support your request indicate that The Industrial Development Authority of the City of Kansas City, Missouri (the "Authority") proposes to issue its revenue bonds and to loan the proceeds therefrom to Saint Luke's Hospital of Kansas City, a Missouri not-for-profit corporation (the "Corporation") for the purpose of refinancing and extinguishing certain outstanding indebtedness previously incurred by the Corporation in

The Honorable Harry Wiggins

connection with the purpose, construction, extension and improvement of a hospital facility located in Kansas City, Missouri (the "Hospital"). The Authority is an industrial development corporation which was created and now exists pursuant to Chapter 349 of the Revised Statutes of Missouri, 1978, as amended (the "Act"). The Hospital constitutes a "project" as defined in Section 349.010(4) of the Act.

I.

The Act grants to each industrial development corporation very broad powers for achieving the goals and objectives of the Act. Under Section 349.050,

The corporation is hereby granted and may exercise all powers necessary or appropriate to carry out and effectuate its purposes, including but not limited to the following:

. . . .

(4) To promote and solicit industrial and economic development projects as authorized by section 349.010 and to make and execute leases, contracts, releases, compromises and other instruments necessary or convenient for the exercise of its powers or to carry out its purposes;

(5) To acquire, . . . and to improve, maintain, equip and furnish one or more projects, . . . regardless of whether or not any such projects shall then be in existence;

(6) To lease to others any of its projects . . . ;

(7) To sell, assign, mortgage, . . . and convey any or all of its properties . . . ;

(8) To loan the proceeds of the bonds or temporary notes hereinafter authorized to provide for the purchase, construction, extension, and improvement of projects;

The Honorable Harry Wiggins

(9) To issue bonds and temporary notes as hereinafter provided;

. . .

(15) To sell . . . any of its property or projects to any private corporation . . . It shall not be necessary for a corporation [referring to an industrial development corporation] to acquire title to any project. Section 349.050, RSMo Supp. 1983. [Emphasis added.]

Missouri courts have long recognized that "[t]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980). The extensive enumeration of powers in Section 349.050 of the Act, and especially the usage of the "necessary or appropriate" language quoted above, implies that the Missouri General Assembly intended industrial development corporations to have broad powers for carrying out the promotion of industrial and economic development within the state.

The Missouri Supreme Court, in the only case interpreting the Act, construed the powers of industrial development corporations broadly. One of the arguments in State ex rel. Jardon v. Industrial Development Authority, 570 S.W.2d 666 (Mo. banc 1978), was that the corporation had no power to mortgage the project to a trustee for the benefit of bondholders. (Under the original version of the Act, Section 349.050 did not expressly grant the power to mortgage the project.) The court looked to Section 349.075, which provided: "Any such trust agreement may contain such provisions for protecting and enforcing the rights and remedies of the . . . bondholders as may be reasonable and proper [and] . . . such other provisions as the corporation determines reasonable and necessary" Jardon, 570 S.W.2d at 678-79, quoting Section 349.075, RSMo 1978. The court concluded that a mortgage on the project was "reasonable and necessary," and was therefore within the implied or express powers of the corporation.

From the broad grant of express powers in the Act, the powers implied by the "necessary or appropriate" language, and the liberal interpretation of the Act in Jardon, it appears that the legislature intended for industrial development corporations to have broad, flexible powers in order to carry out the purposes of the Act.

The Honorable Harry Wiggins

II.

Section 349.055 of the Act grants industrial development corporations the power to "issue revenue bonds for the purpose of paying any part of the cost of any project or part thereof." It is clear under the Act that industrial development corporations have the power to issue bonds for the purpose of financing projects which have already been completed. Section 340.010 defines "project" as follows:

[T]he purchase, construction, extension and improvement of plants, buildings, structures, or facilities, whether or not now in existence Section 349.010(4), RSMo Supp. 1983.
[Emphasis added.]

It is also clear that the Authority has the power to purchase a project, "whether or not any such projects shall then be in existence; . . .", Section 349.050(5), RSMo Supp. 1983, and to then lease or sell such project to another entity. Section 349.050(6) and (7), RSMo Supp. 1983. Since a project already in existence is still a "project" under the Act, it is inevitable that bond proceeds used by the Authority to purchase an existing project from a private corporation would ultimately be applied to reimburse such corporation for its costs incurred, or to extinguish indebtedness previously incurred, in constructing the project. This was the situation in Jardon, where Leggett and Platt, the private corporation, had completed the construction of the project before the bonds were issued. The industrial development corporation in Jardon intended to issue its bonds to purchase the project and then lease it back to Leggett and Platt.

Industrial development corporations also loan the proceeds of their revenue bonds to private corporations for projects. Although the original version of the Act contained no express power to loan bond proceeds, the 1980 amendment (L. 1980 H.B. 1582 and 1277) added the power to "loan the proceeds of the bonds or notes . . . to provide the the purchase, construction, extension and improvement of projects;" Section 349.050(8), RSMo Supp. 1983. There is little practical distinction among a sale/saleback, a sale/leaseback and a loan of bond proceeds under a loan agreement, as contemplated under the Act. In each case, the private corporation has possession and enjoyment of the project, the private corporation makes "payments" (described as installment sale, rental, or loan payments) to the industrial development corporation, and the industrial development corporation pays principal and interest on the bonds. The loan agreement method is often preferable because title remains in the private corporation, the equitable owner, and no deeds need be delivered to or from the

The Honorable Harry Wiggins

industrial development corporation. It is significant that the Act expressly provides that "[i]t shall not be necessary for a corporation [apparently referring to an industrial development corporation] to acquire title to any project." Section 349.050(15), RSMo Supp. 1983.

If an industrial development corporation has the power to issue bonds to purchase existing projects, the proceeds of which bonds are then used to reimburse the corporation for its construction costs or to refinance existing indebtedness incurred by the corporation to pay such costs, and then sell or lease the project back to a private corporation, it is unlikely that the legislature intended that the industrial development corporation should not have the power to accomplish the same objective by a more direct, efficient and less costly method, i.e., a loan of bond proceeds. As the Missouri Supreme Court said in Household Finance Corp. v. Robertson, 364 SW.2d 595 (Mo. banc 1963),

If a statute is susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute" 364 S.W.2d at 602.

III.

Based on (1) the broad scope of powers expressly granted to the Authority under the Act, (2) the powers implied by the "necessary or appropriate" language therein, (3) prior liberal construction of the powers of industrial development corporations by the Missouri Supreme Court sitting en banc, (4) the definition of "project" under the Act as including facilities already in existence, and (5) the express power under the Act to loan bond proceeds for the purpose of paying the costs of projects, we conclude that the Authority has power under the Act to loan the proceeds of its revenue bonds to the Corporation for the purpose of reimbursing the Corporation for costs previously incurred and extinguishing indebtedness previously incurred in connection with the purchase, construction, extension or improvement of the Hospital.

CONCLUSION

It is the opinion of this office that industrial development corporations organized under the Industrial Development Corporations Act, Chapter 349 of the Revised Statutes of Missouri, 1978, as amended, have the power and authority to issue revenue bonds and

The Honorable Harry Wiggins

to loan the proceeds therefrom to a corporation for the purpose of reimbursing such corporation for costs previously incurred and for refinancing and extinguishing outstanding indebtedness previously incurred in connection with the purchase, construction, extension or improvement of projects as defined under the Act.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

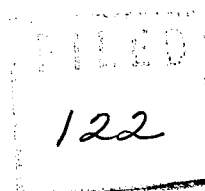
(314) 751-3321

DIRECT DIAL:

September 18, 1984

OPINION NO. 122-84

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

Pursuant to the order pendente lite entered in Payne v. Kirkpatrick, No. CV184-907CC (Circuit Court of Cole County, Division II) on September 17, 1984, I hereby state that if the Secretary of State had certified the sufficiency of the initiative petition submitting the enclosed proposed amendment to the Constitution to the voters, I would have certified the official ballot title, pursuant to Section 116.160.2, RSMo Supp. 1983, as follows:

Authorizes pari-mutuel wagering on horse racing; creates Missouri Horse Racing Commission; creates special fund allocated to Commission, certain educational programs, horse research, and prizes; allows voters of each county to prohibit pari-mutuel wagering locally.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Enclosure

DEPARTMENT OF NATURAL RESOURCES:
ENVIRONMENTAL CONTROL:
OIL & GAS COUNCIL:
WATER POLLUTION:
WELLS:

The laws of the State of Missouri provide adequate authority to the Department of Natural Resources to carry out a program for the control of underground

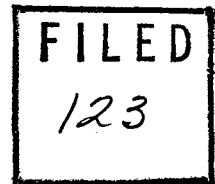
injection wells as described in the Program Description submitted to the EPA and as required by 40 CFR Part 145.

September 24, 1984

OPINION NO. 123-84

Mr. Fred A. Lafser, Director
Department of Natural Resources
1915 Southridge Plaza
Jefferson City, MO 65102

AMENDED
April 2, 1985



Dear Mr. Lafser:

This opinion is issued in response to your question asking:

Do the laws of the State of Missouri provide adequate authority to the Department of Natural Resources to carry out a program for the control of underground injection wells as described in the Program Description submitted to the EPA and as required by 40 CFR Part 145?

INTRODUCTORY EXPLANATION

General:

Section 204.026¹ provides that the Missouri Clean Water Commission shall have, inter alia, the power to:

(8) Adopt, amend, promulgate, or repeal after due notice and hearing, rules and regulations to enforce, implement, and effectuate the powers and duties of sections 204.006 to 204.141 and any required of this state by any federal water pollution control act, and as the commission may deem necessary to prevent, control and abate existing or potential pollution;

* * *

¹All references to Missouri statutes are to RSMo 1978, unless otherwise noted.

Fred A. Lafser

(15) To exercise all incidental powers necessary to carry out the purposes of sections 204.006 to 204.141, assure that the state of Missouri complies with any federal water pollution control act, retains maximum control thereunder and receives all desired federal grants, aid and benefits.

Thus, the department may promulgate regulations as necessary to enforce "any federal water pollution control act" and as necessary to achieve and maintain maximum compliance with and control under "any federal water pollution control act." Moreover, the department has broad statutory authority to regulate, as necessary, to prevent, control, or abate existing or potential pollution.

Pollution is defined in Section 204.016(7) as:

[S]uch contamination or other alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is reasonably certain to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, industrial, agricultural, recreational, or other legitimate beneficial uses, or to wild animals, birds, fish or other aquatic life.

Waters of the state, as defined in Section 204.016(15), includes bodies of subsurface water. 40 CFR Section 146.3 defines a well injection as:

the subsurface emplacement of "fluids" through a bored, drilled or driven "well;" or through a dug well, where the depth of the dug well is greater than the largest surface dimension.

We conclude that a well injection, i.e., the subsurface emplacement of fluids, constitutes pollution of the waters of the state, as defined above. Consequently, the department possesses the authority, under the Missouri Clean Water Law, to regulate all injection wells.

Fred A. Lafser

The authority of the state to act in a preventative capacity with respect to pollution of the waters of the state has been recognized by the Missouri courts. In State ex rel. Ashcroft v. Mathias, 616 S.W.2d 882 (Mo.App., E.D. 1981) the court recognized that the permit system for dischargers served the statutory purpose of preventing rather than merely abating pollution. Similar statements appear in State ex rel. Ashcroft v. Union Electric Company 559 S.W.2d 216, 221 (Mo.App., K.C.D. 1977) ("The Missouri Clean Water Law . . . is ensconced in a broad, pervasive legislative intent to keep the 'waters of the state' free of 'pollution' from external causes and sources." (Emphasis in original.)) and Hammack v. Missouri Clean Water Commission, 659 S.W.2d 595, 600 (Mo.App., S.D., 1983) ("Clean water is the essence and life-blood of our society. Without it we will perish. The legislature had commendably, through the passage of the Clean Water Act, given the tools to the commission to insure that the waters of Missouri remain clean and pure, and to abate pollution in those areas where it has already occurred.").

State ex rel. Ashcroft v. Union Electric Co., 559 S.W.2d 216 (Mo.App., K.C.D. 1977) further clarifies the definition of pollution by specifying the requirement that it must be caused by the introduction into waters of the state of some substance from an external source and not, as the state there contended, by the operation of a hydroelectric dam in such a way as to cause levels of dissolved oxygen in downstream water to fall below the levels necessary to support aquatic life. This case, however, has no impact on the definition of pollution as that term relates to well injections because such injections, by definition, involve the emplacement of a fluid from an external source into the subsurface.

Classes I and IV:

Section 577.155.1, RSMo Supp. 1984, prohibits the construction and use of any waste disposal well located in the state. Section 577.155.2 defines "waste disposal well" as "any subsurface void porous formation or cavity, natural or artificial, used for disposal of liquid or semiagueous waste except as excluded in subsection 3 of this section." Section 577.155.3 contains certain exceptions.

Injection wells are defined by federal regulation as wells into which "fluids" are injected (40 CFR 146.3). Class I wells are fluid injection wells used to inject hazardous, industrial, or municipal waste beneath the lower-most formation containing an underground source of drinking water within one quarter mile of the well bore. Class IV injection wells are wells used to dispose of hazardous or radioactive waste into or above a formation

Fred A. Lafser

which contains an underground source of drinking water within one quarter of a mile. Because neither Class I nor Class IV wells are within any of the exceptions in Section 577.155.3 and not otherwise authorized, we conclude that the construction or use of any Class I or Class IV injection well is prohibited by Section 577.155.

One additional exception to the prohibition of Section 577.155.1 is the injection or return of fluids into subsurface formations in connection with oil or gas operations regulated by the State Oil and Gas Council pursuant to Chapter 259, RSMo. Section 577.155.4(1). (Such practice is also exempted from the coverage of the Missouri Hazardous Waste Management law in identical language at Section 260.355(4), RSMo 1978.) It is the opinion of the Missouri Attorney General that "in connection with oil or gas operations," as that language is used in Chapters 577 and 260 exclusions, must be read to include only those operations directly associated with the recovery of oil or gas from subsurface formations and not operations associated with the refining or other processing of the minerals after they have been extracted from the earth. This conclusion is based on the fact that Chapter 259 regulates only the drilling of wells, the production of oil or gas from those wells, the plugging of the wells, and certain measuring and recording functions. Neither Chapter 259 nor the regulations promulgated under it at 10 CSR Div. 50 address such areas as the refining of the raw product. Indeed, the powers and duties of the Oil and Gas Council as established by the legislature in Section 259.070, RSMo Supp. 1984, do not extend to refinery operations. The exclusion in Sections 577.155.4(1) and 260.355(4) does not extend to the injection of waste associated with refinery operations or originating from any other source except the extraction operations. Thus, the prohibition in Section 577.155 against any waste disposal well extends to wells used to dispose of any hazardous waste as the term "hazardous waste" is defined in the federal regulations at 40 CFR Part 261.3 and .4 including the exclusion of "Drilling fluids, produced waters and other wastes associated with the exploration development, or production of crude oil, natural gas or geothermal energy" at 40 CFR, Part 261.4(b)(5).

We also note that the state provisions banning all Class I injection wells are more stringent than the federal requirements under 40 CFR 146, Subpart B, which do allow Class I injection wells when authorized by permit.

Class V:

Under the federal regulatory scheme, Class V wells are authorized by rule "until further requirements under future regulations become applicable." 40 CFR Section 144.24. However, the director may require permits for such wells. 40 CFR Section 144.25.

Fred A. Lafser

In Missouri Class V wells are regulated by three different mechanisms depending on the type of well.

Class V wells which may be classified as waste disposal wells and not subject to any of the exceptions in Section 577.155.3, are prohibited by Section 577.155.1. Examples of such wells include those listed in 40 CFR Section 146.5(e)(4),(5),(9) and (11).

Groundwater heat pump injection withdrawal wells serving more than eight single family residences or operating at a combined injection/withdrawal rate of more than 600,000 British Thermal Units are subject to the special permitting requirement of 10 CSR 20-6.070(1)(B).

All other types of Class V wells are subject to the general permitting requirements of Chapter 204 and 10 CSR 20-6, as detailed below.

Section 204.051.2, RSMo Supp. 1983, of the Missouri Clean Water Law provides, in part:

2. It shall be unlawful for any person to build, erect, alter, replace, operate, use or maintain any water contaminant or point source in this state that is subject to standards, rules or regulations promulgated pursuant to the provisions of sections 204.006 to 204.141 unless he holds a permit from the commission, subject to such exceptions as the commission may prescribe by rule or regulation. . . .

"Water contaminant source" is defined in Section 204.016(13) as:

[T]he point or points of discharge from a single tract of property on which is located any installation, operation or condition which includes any point source defined in sections 204.006 to 204.141 and nonpoint source under any federal water pollution control act, which causes or permits a water contaminant therefrom to enter waters of the state either directly or indirectly;

Fred A. Lafser

"Point source," as defined in Section 204.016(6), "means any discernable, confined, and discrete conveyance, including but not limited to any . . . , well, . . . from which pollutants are or may be discharged." A water contaminant, as defined in Section 204.016(12), is:

any particulate matter or solid matter or liquid or any gas or vapor or any combination thereof, or any temperature change which is in or enters any waters of the state either directly or indirectly by surface runoff, by sewer, by subsurface seepage or otherwise, which causes or would cause pollution upon entering waters of the state, or which violates or exceeds any of the standards, regulations or limitations set forth in sections 204.006 to 204.141 or any federal water pollution control act, or is included in the definition of pollutant in such federal act.

And finally, "waters of the state" is defined in Section 204.016(15) as "all rivers, streams, lakes, and other bodies of surface or subsurface water. . . ."

Reading these provisions together we conclude that it is unlawful under Section 204.051.2 to build, erect, alter, replace, operate, use, or maintain any well which discharges or may discharge pollutants into subsurface waters and which is subject to standards, rules or regulations of the Clean Water Commission, unless a permit to do so has been obtained from the Commission. We also believe that an injection well is a point source that is subject to standards, rules and regulations, and that construction or operation of an injection well would require a permit from the Commission.

Regulation 10 CSR 20-6.010(1)(A) describes who must apply for a permit:

(A) All persons who build, erect, alter, replace, operate, use, or maintain existing or proposed point sources, water contaminant sources or wastewater treatment facilities shall apply to the department for the permits required by the Missouri Clean Water Law and these regulations. The department shall issue these permits in order to enforce the Missouri Clean Water Law and regulations and administer the NPDES program.

Fred A. Lafser

Regulation 10 CSR 20-6.010(1)(B) identifies sources which are exempt from the permit requirement:

(B) The following are exempt from permit regulations:

1. Nonpoint source discharges;
2. Service connections to sewer systems;
3. Internal plumbing and piping or other water diversion or retention structures within a manufacturing or industrial plant or mine, which are an integral part of the industrial or manufacturing process or building, or mining operation. An operating permit or general permit shall be required, if such piping, plumbing, or structures result in a discharge to waters of the state;
4. Routine maintenance or repairs of any existing sewer system, wastewater treatment facility, or other water contaminant or point source;
5. Single family residences; and
6. Separate storm sewers are subject only to the general permit requirements.

Reading these two provisions together, we conclude that all water contaminant sources, point sources and wastewater treatment facilities which are not specifically exempted in subparagraph (B) are required to be permitted. Class V injection wells are point sources and the only Class V wells which fall into one of the six exempted categories above are single family residence wells and separate storm sewers. However, storm sewers are subject to the general permitting requirements of 10 CSR 20-6.010(14) and single family residence wells are exempted from UIC requirements by 40 CFR Section 146.5(e)(9). Thus, we further conclude that a permit must be obtained under the general permitting provisions of Chapter 204 and 10 CSR 20-6.010 for the construction or operation of a Class V injection well other than a heat pump.

Thus, the only Class V wells not subject to permitting requirements are heat pumps serving eight or fewer single family residences with a combined injection/withdrawal rate of less than 600,000 BTU's per hour which are exempted under 10 CSR 20-6.070(1)(c).

Fred A. Lafser

40 CFR Section 144.26 requires the owners or operators of all Class V wells to submit specific inventory information. This requirement is complied with by the permitting requirement because all inventory information is collected as part of the permitting process. For those Class V wells exempted from the permit requirement by 10 CSR 20-6.070(1)(A), inventory information is collected under the authority of 10 CSR 20-6.070(1)(D) which requires the owners or operators of all such wells to submit the required information.

Because Class I and IV wells are prohibited by law in Missouri and Class V wells are subject only to the inventory requirement and a showing of state authority to promulgate regulations for this Class once such requirements are in place at the federal level, topics which have been covered above, the remainder of this opinion will address only Class III wells.

1. Prohibition of Unauthorized Injection

State Statutory and Regulatory Authority:

Class III: 10 CSR 20-6.090(1)(C)

Remarks of Attorney General

10 CSR 20-6.090(1)(C) provides that:

"All persons who build, erect, alter, replace, operate, use or maintain existing or proposed Class III injection/production wells shall apply to the department for permits required by these regulations. . . ."

Class III wells are defined in 10 CSR 20-6.090(1)(A) consistently with the federal definition in 40 CFR 144.6(c). The permitting process operates as an authorization and thus we conclude that the permit requirement is equivalent to a prohibition of unauthorized injections.

2. Prohibition of Endangering Drinking Water Sources

A. For Authorization of Underground Injection by Permit

State Statutory and Regulatory Authority:

10 CSR 20-6.090(4)(A)1.
10 CSR 20-6.070(4)(A)4.
204.051-1(1)
204.016(7) and (15)
10 CSR 20-7.031(1)(B)6.

Fred A. Lafser

Remarks of Attorney General

For Class III wells authorized by permit, those permits require the permittee to comply with all applicable provisions of the Missouri Clean Water Law and the regulations promulgated by the Commission (10 CSR 20-6.090(4)(A), and 10 CSR 20-6.070(4)(A)4.). The Clean Water Law, at Section 204.051.1(1), provides that it is unlawful for any person "to cause pollution of any waters of the state or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the state."

Waters of the state, as defined at Section 204.016(15) include subsurface waters; and pollution, as defined at Section 204.106(7), include any contamination or discharge "into any waters of the state as will or is reasonably certain to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, industrial, agricultural, recreational, or other legitimate beneficial uses, or to wild animals, birds, fish or other aquatic life."

Endangerment of drinking water supplies is clearly a result which is "harmful, detrimental or injurious to public health, safety or welfare." Moreover, beneficial uses is defined at 10 CSR 20-7.031(a)(B)6 to include drinking water supplies.

Thus we conclude that under state law no permit will be granted or continued in force for an underground injection that endangers drinking water sources.

B. For Authorization of Underground Injection by Rule

State Statutory and Regulatory Authority

10 CSR 20-6.090(1)(C)

Remarks of Attorney General

Class III underground injection wells are authorized by permit only.

3. **Prohibition of Movement of Fluid into a USDW**

State Statutory and Regulatory Authority

10 CSR 20-6.090(4)(B)

10 CSR 20-6.090(4)(C)

Remarks of Attorney General

10 CSR 20-6.090(4)(B) provides that no Class III well may be operated or maintained in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water.

10 CSR 20-6.090(4)(C) provides that:

"[I]f any water quality monitoring of any underground source of drinking water indicates the movement of any contaminant into the underground source of drinking water, the director shall prescribe such additional requirements for construction, corrective action, operation, monitoring, or reporting (including closure of the injection/production well) as are necessary to prevent such movement. These additional requirements shall be imposed by modifying the permit in accordance with this regulation, or the permit may be terminated."

4. Authority to Issue Permits or Rule

State Statutory and Regulatory Authority

(1) By permits

Section 204.026(13) and (15)
10 CSR 20-6.090(1)(C)

(2) No Class III wells are authorized by rule.

(3) By area permit

Section 204.026(13)
10 CSR 20-6.090(3)(D)

(4) No Class III wells are authorized by emergency permit.

Remarks of Attorney General

Section 204.026(13) authorizes the Missouri Clean Water Commission to issue permits "under such conditions as it may prescribe, to prevent, control or abate pollution or any violations of sections 204.006 to 204.141 or any federal water pollution control act."

Fred A. Lafser

Section 204.026(15) authorizes the Commission to:

"Exercise all incidental powers necessary to carry out the purposes of sections 204.006 to 204.141, assure that the state of Missouri complies with any federal water pollution control act, retains maximum control thereunder and receives all desired federal grants, aid and benefits."

The regulatory provisions cited are the implementing sections.

Taken together, the two sections of the statute cited above authorize the Missouri Clean Water Commission to issue permits for underground injection wells in accordance with the regulations promulgated by the U.S. E.P.A.

5. Authority to Condition Authorized Injection Activities

State Statutory and Regulatory Authority

Section 204.026(13) and (15)

10 CSR 20-6.090(2)
10 CSR 20-6.090(2)(I)1.-6.
10 CSR 20-6.090(3)
10 CSR 20-6.090(4)
10 CSR 20-6.090(5)(A)
10 CSR 20-6.090(4)(A)2.E.
10 CSR 20-6.090(4)(A)2.
10 CSR 20-6.090(4)(A)5.

Remarks of the Attorney General

The two sections of the statute authorize the Missouri Clean Water Commission to condition permits for underground injection wells in accordance with 40 CFR Section 144.51 and Section 144.52.

The application procedure for Class III permits, including the information required of the applicant and factors the director must consider in making the permitting decision, are contained in 10 CSR 20-6.090(2). Permit issuance and appeal procedures are covered in 10 CSR 20-6.090(3). Required terms and conditions of the permit are specified in 10 CSR 20-6.090(4). 10 CSR 20-6.090(5) further specifies that "no permit shall be issued whose terms and conditions do not comply with 'relevant federal laws.'"

Fred A. Lafser

10 CSR 20-6.010(4)(A)2. provides that the director may modify or revoke the permit upon receipt of notice of a proposed transfer and for other reasons including, but not limited to, those listed.

10 CSR 20-6.090(4)(A)5. sets forth causes for which the director may terminate or deny renewal of a permit.

6. Authority to Impose Compliance Evaluation Requirements

A. Authority to Enter for Inspections.

State Statutory and Regulatory Authority

Section 204.026(20)

Section 204.056.1

10 CSR 20-6.090(4)(A)6.

Remarks of Attorney General

Section 204.026(20) of the Clean Water Law authorizes the Commission or authorized representatives to enter public or private property at reasonable times, upon reasonable notice, for the purposes of inspection or investigation of compliance with permit conditions. The section also provides for a suitably restricted search warrant, upon a showing of probable cause, if entry is refused. Probable cause, in the context of an administrative search, has been found by the Supreme Court to exist "[i]f a valid public interest justifies the intrusion contemplated." Camara v. Municipal Court, 387 U.S. 523, 538 (1967). The public interest in the maintenance of a safe drinking water supply is certainly such a valid interest. Section 204.056.1 provides authority for investigations of alleged violations of permit terms or conditions.

10 CSR 20-6.090(4)(A)6 authorizes representatives of the department to enter into a permittee's premises for the purposes of inspection, sampling and access to and copying of pertinent records.

The above provisions provide authority for entry onto a permittee's premises in accordance with 40 CFR Section 144.51(i).

B. Authority to Conduct Inspections and Require Monitoring.

The authority to conduct inspections is covered in Part 6.a. above.

Fred A. Lafser

State Statutory and Regulatory Authority

Section 204.026(23)

10 CSR 20-6.090(4)(A)9
10 CSR 20-6.090(4)(A)10
10 CSR 20-6.090(4)(A)11
10 CSR 20-6.090(4)(A)12
10 CSR 20-6.090(4)(D)

Remarks of Attorney General

Section 204.026(23) authorizes the Commission to require permittees to:

"[C]onduct any tests and monitoring necessary to establish and maintain records and to file reports containing information relating to measures to prevent, lessen or render any discharge less harmful or relating to rate, period, composition, temperature, and quality and quantity of the effluent, and any other information required by any federal water pollution control act or the executive secretary hereunder."

The regulations cited contain the specific requirements for monitoring and reporting. The above cited provisions provide sufficient authority for the required monitoring activities specified in 40 CFR Section 144.51(i).

C. Authority to require the keeping of records and making of reports.

State Statutory and Regulatory Authority

Section 204.026(23)

10 CSR 20-6.090(1)(F)
10 CSR 20-6.090(4)(A)8
10 CSR 20-6.090(4)(A)9
10 CSR 20-6.090(4)(A)10
10 CSR 20-6.090(4)(A)11
10 CSR 20-6.090(4)(A)12

Remarks of Attorney General

Section 204.026(23) as noted above in 6.b. authorizes the Commission to require permittees to keep records and prepare reports. The regulations cited contain specific recording and reporting requirements. These provisions are ample authority for the implementation of the requirements in 40 CFR Section 144.51(1).

7. Authority for Enforcement Requirements

A. Authority to Issue Cease and Desist or Temporary Restraining Orders

State Statutory and Regulatory Authority

Section 204.076.1

Section 204.056.3

Section 640.130.1

Remarks of Attorney General

The above-cited sections of the statutes authorize the Department of Natural Resources to issue ex parte orders against unauthorized underground injection practices which pose imminent threats of harm to the public health or environment, or, in the alternative, to request the attorney general to bring a suit for injunctive action in the courts of the state under the same conditions.

B. Authority to Sue

State Statutory and Regulatory Authority

Section 204.076.1

Remarks of Attorney General

The above-cited section authorizes the Clean Water Commission or the Department director to request either the Attorney General or a prosecuting attorney to sue in the courts of this state for violations of any program requirement or permit condition without the necessity of prior revocation of a permit.

C. Penalties

(1) Civil Penalties

Fred A. Lafser

State Statutory and Regulatory Authority

Section 204.076.1

Remarks of Attorney General

The above-cited section of the statute authorizes suit for the assessment of a penalty not to exceed \$10,000 per day for each day, or a part thereof, the violation occurs and continues to occur as the court deems proper.

(2) Criminal Fines

State Statutory and Regulatory Authority

Section 204.076.3

Remarks of Attorney General

The above-cited section of the statute authorizes suit seeking criminal penalties against any person who willfully or negligently commits any violation set forth under subsection 1 of not less than \$2500 or nor more than \$25,000 per day of violation. Second and successive convictions for violation of the same provision are punishable by a fine of not more than \$50,000 per day.

N.B. The penalty provisions under Section 577.155 for Class I and IV wells do not satisfy the federal requirements because of the absence of civil penalties and because the amount of the criminal fine is less than five thousand dollars for some offenders. Nevertheless, other sanctions which do meet these requirements are available to address Class I and IV wells.

Class I and IV wells which dispose of hazardous waste would be subject to the civil and criminal penalties of the Missouri Hazardous Waste Management Law, in addition to the sanctions of Section 577.155. The construction and use of Class IV wells, and Class I wells which dispose of hazardous waste, would violate Section 260.395.7, RSMo Supp. 1983, which prohibits the construction, alteration, or use of a hazardous waste facility without a permit. Of course, no permit could be issued for these wells in light of the prohibition in Section 577.155. Section 260.425, RSMo Supp. 1983, provides for civil penalties of up to ten thousand dollars per day and criminal penalties of up to twenty-five thousand dollars per day for violations of Sections 260.350-260.430, as amended. These penalties meet the requirements of 40 CFR 145.13.

Fred A. Lafser

Class I and IV wells which dispose of wastes which cannot be defined as hazardous wastes would be subject to the civil and criminal penalties of the Missouri Clean Water Law. Any such well which discharges or may discharge a pollutant to waters of the state would fall within the definition of both "point source" as defined in Section 204.016(6) and "water contaminant source" as defined in Section 204.016(13). As previously discussed in this opinion, the operation of a water contaminant source without a permit from the Clean Water Commission is unlawful. No permit could be issued for those wells in light of the prohibition in Section 577.155. Section 204.076 provides for civil penalties of up to ten thousand dollars per day and criminal penalties of up to twenty-five dollars per day for violations of Sections 204.006-204.141, as amended. These penalties meet the requirements of 40 CFR 145.13.

Neither Section 577.155 nor Section 204.082, RSMo Supp. 1983, both of which classify certain illegal injection practices as misdemeanors, and provide for criminal penalties that are inadequate under the federal standards, in any way constrain the department from taking enforcement actions and seeking penalties under the authority of Section 204.076 or Section 260.425. These former sections simply classify the practices as offenses which may be prosecuted by local law enforcement authorities without the requirement of referral from the department.

D. Authority to seek appropriate penalties

State Statutory and Regulatory Authority

Section 204.076

Remarks of Attorney General

The section of the statute which authorizes the imposition of penalties imposes only upward limits, thereby affording flexibility to the agency to seek lesser amounts where such is warranted by the circumstances. Moreover, Section 204.076.4 provides that penalties shall not be imposed for violations caused by an act of God, war, strike, riot, or other catastrophe.

E. Public participation

State Statutory and Regulatory Authority

10 CSR 20-6.020(7)

Rule 52.12(a), V.A.M.R.

Fred A. Lafser

Remarks of Attorney General

Rule 52.12(a), Intervention of Right, provides that anyone shall be permitted to intervene in an action, inter alia, "when the applicant claims an interest relating to the property or transaction which is the subject of the action, and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Regulation 10 CSR 20-6.020(7) provide that a party may intervene in a hearing before the Clean Water Commission, and such application for intervention shall be ruled on by the Commission in accordance with the standards of Rule 52.12. The above-cited sections provide for a right of public participation consistent with the requirements of 40 CFR Section 145.13(d)(1).

8. Authority for Public Participation in Permit Processing

State Statutory and Regulatory Authority

Section 204.026(8)
Section 204.026(15)
10 CSR 20-6.020

Remarks of Attorney General

The above-cited sections of the Clean Water Law authorize the Commission to promulgate regulations allowing for adequate public involvement and participation in permit processing. 10 CSR 20-6.020(1) addresses draft permits. Public comment is covered in 10 CSR 20-6.020(1)(B). Public hearings are provided for in 10 CSR 20-6.020(4) and response to comment on the final permit is covered in 10 CSR 20-6.020(1)(G).

9. Authority to Apply Technical Criteria and Standards for the Control of Underground Injection not Less Stringent than 40 CFR part 146 and Section 1421(a) and (b)(1)).

State Statutory and Regulatory Authority

Section 204.026(8)
Section 204.026(15)

Fred A. Lafser

Remarks of Attorney General

The above-cited sections of this statute authorize the Commission to adopt, amend, promulgate, or repeal rules and regulations as required of this state "by any federal water pollution act." The statute gives the Commission further incidental powers as necessary to assure that the State of Missouri complies with any federal water pollution control act and retains maximum control thereunder. The cited sections of the statutes authorize the Commission to apply technical criteria and standards for the control of underground injection not less stringent than those contained at 40 CFR part 146.

10. Classification of Injection Wells

See introductory explanation, supra.

11. Elimination of Certain Class IV Wells

See introductory explanation, supra.

12. Authority to identify Aquifers that are Underground Sources of Drinking Water (U.S.D.W.) and to exempt Certain Aquifers

State Statutory and Regulatory Authority

Section 204.026(5)
Section 204.026(15)

Remarks of Attorney General

The above-cited sections of the statute authorize the commission to conduct studies, investigations, and research and to exercise all incidental powers as necessary to assure compliance with any federal water pollution control act and to retain maximum control thereunder. These sections thus provide sufficient authority to undertake a program to identify U.S.D.W. aquifers and exempt certain aquifers in accordance with the requirements of 40 CFR Section 144.7 and Section 146.4. The department has entered into an agreement to undertake such a program in the Memorandum of Understanding.

Fred A. Lafser

13. Authority over Federal Agencies and Persons Operating on Federally Owned or Leased Property

State Statutory and Regulatory Authority

Section 204.016(5)

Section 204.051

Section 204.076

Remarks of Attorney General

Section 204.051 provides that it is unlawful for any person to cause pollution of any waters of the state, to discharge any water contaminants into any waters of the state, or to built, erect, alter, replace, operate, use, or maintain any water contaminant or point source in the state without a permit.

Section 204.076 provides that it is unlawful for any person to cause or permit any discharge of water contaminants from any water contaminant or point source in violation of Chapter 204 or any standard rule or regulation promulgated pursuant thereto. The penalty provisions of this section are similarly worded to refer to "any person."

In Section 204.016(5) the word person is defined to include "any agency, board, department, or bureau of the state or federal government." Thus while Chapter 204 does not specifically address the question of its applicability to federal agencies and facilities, it is the opinion of this office that the provisions of Chapter 204 govern underground injection well activities by federal agencies and on federal lands.

14. State Authority over Indian Lands.

There are no Indian lands located within the State of Missouri.

15. Authority to Revise State Underground Injection Control Programs.

State Statutory and Regulatory Authority

Section 204.026(8)

Section 204.026(15)

Fred A. Lafser

Remarks of Attorney General

The above cited sections of the statute authorize the Commission to adopt, amend, promulgate or repeal rules and regulations as required by any federal water pollution control act. The statute further authorizes the Commission to exercise all incidental powers as necessary to assure that the State of Missouri complies with any federal water pollution control act and retains maximum control thereunder. Together these two sections of the statute provide adequate authority to the state to revise regulations governing the state underground injection control program.

16. Authority to Make and Keep Records and Make Reports on its Program Activities, all as prescribed by the Environmental Protection Agency.

State Statutory and Regulatory Authority

Section 204.026(15)

Remarks of Attorney General

The above-cited section, authorizing the Commission to exercise all incidental powers necessary to carry out the purposes of Chapter 204 and to assure compliance with any federal water pollution control act, provides adequate authority to require the making and keeping of records and reports on program activities in accordance with the requirements of the Environmental Protection Agency.

17. The State Must Have Authority to Make Available to EPA upon Request, without Restriction, any Information Obtained or Used in the Administration of the State Program, Including Information Claimed by Permit Applicants as Confidential.

State Statutory and Regulatory Authority

Section 204.026(20)

Remarks of Attorney General

Section 204.026(20) governs the disclosure of information obtained by the Department of Natural Resources or the Clean Water Commission under the Missouri Clean Water Law. The general rule is that all information will be made available to the public. However, if the information constitutes trade secrets or confidential information, other than effluent data, it shall be kept confidential unless disclosure is required under any federal water pollution control act.

Fred A. Lafser

We note that certain information submitted to EPA under the federal program is also subject to nondisclosure requirements. EPA has promulgated regulations at 40 CFR Part 2 governing the handling of information submitted under claim of confidentiality. One of the categories of information which is subject to federal confidentiality requirements is confidential business information. 40 CFR 2, Subpart b. We read the federal regulations to provide protection for as broad a category of business information as is protected by Section 204.026(20). See 5 U.S.C. Section 552(b)(4); 40 CFR 2.201(e), 2.208(c), and 2.208(e)(1).

In light of the fact that federal regulations at 40 CFR Part 2 facially provide the same degree of protection for trade secrets and confidential business information as is provided by the state statute, we believe that Section 204.026(20) does not prohibit the state from sharing such information with EPA. So long as EPA can protect the information to the same extent as the state, assuming protection is warranted, we do not view EPA as being a part of "the public" as that term is used in Section 204.026(20), thus, EPA is entitled to information submitted to the state, even if submitted to the state under a claim of confidentiality. All information not subject to confidentiality claims would be available to EPA without restriction. Our opinion in regard to the above is premised exclusively on the protection facially afforded by 40 CFR Part 2 against improper disclosure of confidential information.

CONCLUSION

The laws of the State of Missouri provide adequate authority to the Department of Natural Resources to carry out a program for the control of underground injection wells as described in the Program Description submitted to the EPA and as required by 40 CFR Part 145.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General

HEALTH AND EDUCATIONAL FACILITIES AUTHORITY:
SOCIAL SECURITY:
STATE DEPARTMENTS:

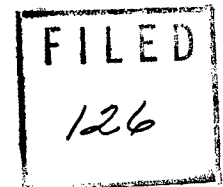
The Health and
Educational Fa-
cilities Authority
organized under

Chapter 360, RSMo 1978 & Supp. 1983, is an instrumentality of the state for purposes of 42 U.S.C.S. Section 418 (L.Ed. 1978 & Supp. 1984) and Sections 105.300 to 105.440, RSMo 1978 & Supp. 1983.

November 14, 1984

OPINION NO. 126-84

John A. Pelzer, Commissioner
Office of Administration
Post Office Box 809
Jefferson City, Missouri 65102



Dear Mr. Pelzer:

This opinion is in response to your questions asking:

1. Is the Health and Educational Facilities Authority of the State of Missouri, described under Chapter 360 RSMo. 1978, a public or private organization?
2. If governmental, is the Health and Educational Facilities Authority an instrumentality of the state as defined in Sections 105.300.7 and 105.350.1 RSMo 1978, for the purposes of extending benefits of Title 2 of the Social Security Act (42 U.S.C.A., Section 401 et. seq.), or is it a state agency?

42 U.S.C.S. Section 418 (L.Ed. 1973 & Supp. 1984) extends Federal Old-Age and Survivors Insurance to the employees of any state or political subdivision thereof, when an agreement has been made to extend coverage to such state or political subdivision.

42 U.S.C.S. Section 418(b)(1) (L.Ed. 1973) states: "The term 'State' does not include the District of Columbia, Guam, or American Samoa." 42 U.S.C.S. Section 418(b)(2) (L.Ed. 1973) states: "The term 'political subdivision' includes an instrumentality of (A) a State, (B) one or more political subdivisions of a State, or (C) a State and one or more of its political subdivisions."

Section 105.310, RSMo 1978, requires the "state agency" (defined in Section 105.300(11), RSMo Supp. 1983, as the Division of Accounting in the Office of Administration) upon the approval of the Governor to enter into an agreement extending the benefits of the federal old-age and survivors insurance system to employees of

John A. Pelzer

the state, to the state's political subdivisions, and to any instrumentality. Section 105.350.1, RSMo 1978, provides that each political subdivision of the state and each instrumentality of the state or of a political subdivision may submit to the state agency a plan for extending the benefits of Title 2 of the Social Security Act to its employees.

Section 105.300(8), RSMo Supp. 1983, defines the phrase "political subdivision" as "any county, township, municipal corporation, school district, or other governmental entity of equivalent rank;". Section 105.300(7), RSMo Supp. 1983, defines the term "instrumentality" as "an instrumentality of a state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision;".

Section 360.020, RSMo 1978, states in part:

There is hereby created a body politic and corporate to be known as the "Health and Educational Facilities Authority of the State of Missouri". The authority is hereby constituted a public instrumentality and body corporate, . . .

In Menorah Medical Center v. Health and Educational Facilities Authority, 584 S.W.2d 73, 82 (Mo. banc 1979), the court held that the Health and Educational Facilities Authority ("HEFA") is a public body and instrumentality separate and apart from the state.

Reorganization Plan No. 2 of 1976 and the Executive Order dated August 11, 1976, App. A, RSMo 1978, assigned HEFA to the Department of Consumer Affairs, Regulation, and Licensing ("CARL")¹ and stated that the staff of HEFA was provided by CARL. Under Reorganization Plan No. 2 of 1976, HEFA was treated in a manner similar to the Missouri Housing Development Commission in House Bill No. 1797, Seventy-Seventh General Assembly, Second Regular Session, as amended by House Bill No. 528, Eighty-Second General Assembly, First Regular Session, App. B(1), RSMo Supp. 1983.

Reorganization Plan No. 2 of 1976, however, was revoked by Reorganization Plan No. 1 of 1978 and the Executive Order dated January 11, 1978, App. A, RSMo 1978. Under Reorganization Plan No. 1 of 1978, HEFA is still assigned to CARL, but HEFA's staff is provided by HEFA, not CARL.

¹Senate Joint Resolution No. 17, Eighty-Second General Assembly, Second Regular Session (adopted August 7, 1984, effective thirty days thereafter, Article XII, Section 2(b), Missouri Constitution), deletes CARL from the list of constitutionally enumerated state departments and adds the Department of Economic Development to this list.

John A. Pelzer

The definition of "instrumentality" in Section 105.300(7), RSMo Supp. 1983, establishes two conditions that must be met for "instrumentality" status: (1) The instrumentality must be a juristic entity legally separate and apart from the state or its political subdivisions, and (2) the employees of the instrumentality cannot be employees of the state or its political subdivisions.

HEFA satisfies the first condition, because it is an entity separate and apart from the state. Menorah Medical Center, 584 S.W.2d at 82. HEFA, satisfies the second condition also, because its employees are employees of HEFA, not CARL. Therefore, HEFA is an instrumentality of the state for purposes of 42 U.S.C.S. Section 418 (L.Ed. 1973 & Supp. 1984) and Sections 105.300 to 105.440, RSMo 1978 & Supp. 1983.

CONCLUSION

It is the opinion of this office that the Health and Educational Facilities Authority organized under Chapter 360, RSMo 1978 & Supp. 1983, is an instrumentality of the state for purposes of 42 U.S.C.S. Section 418 (L.Ed. 1973 & Supp. 1984) and Sections 105.300 to 105.440, RSMo 1978 & Supp. 1983.

Yours very truly, _____



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

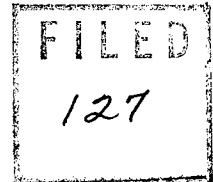
(314) 751-3321

October 15, 1984

DIRECT DIAL:

OPINION LETTER NO. 127-84

Dr. Shaila Aery, Commissioner
Department of Higher Education
101 Adams Street
Jefferson City, Missouri 65101



Dear Dr. Aery:

This opinion is in response to your request as follows:

Is the Missouri Higher Education Loan Authority (MOHELA) authorized under the Higher Education Loan Authority Act, Sections 173.350 et seq. RSMo. Supp. 1983, to issue revenue bonds the interest on which is not exempt from taxation by the United States?

We understand that MOHELA is presently attempting to issue additional revenue bonds to refund its indebtedness on a tax-exempt basis. Such a refund will further MOHELA's mission of providing "eligible postsecondary education students. . . access to guaranteed student loans. . . ." Section 173.360^{1/}. We further understand that in order for MOHELA to issue its bonds, the United States Department of Education must approve special allowance payments to MOHELA on the proposed tax-exempt bond issue. The approval of such special allowance payments is contingent on a legal conclusion that MOHELA may not, under Missouri law, issue bonds which are taxable for purposes of the Internal Revenue Code of 1954 (as amended). This opinion is to serve as that legal conclusion.^{2/}

^{1/}Unless otherwise denoted, all statutory references herein are to RSMo Supp. 1983.

^{2/}The legal conclusions reached herein are not intended to apply to entities other than MOHELA which have statutory authority to issue bonds.

There can be no doubt but that MOHELA bonds are exempt from taxation under Missouri law. Section 173.390. However, Missouri statutes cannot, of themselves, create an exemption from federal income taxation. This opinion will, therefore, turn on an analysis of whether the General Assembly has provided MOHELA authority to issue revenue bonds the holder's interest on which is taxable by the federal government. As always, our intent in rendering this opinion is to seek the intent of the legislature. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980).

MOHELA is a body politic and corporate. Section 173.360. It is a "separate entity" from the State of Missouri. Section 173.410; State ex inf. Danforth ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. banc 1975); Menorah Medical Center v. Health and Education Facilities Authority, 584 S.W.2d 73 (Mo. banc 1979). For purposes of this opinion, we believe that the statutory grant of powers to MOHELA must be analyzed as if MOHELA were a municipal corporation.^{3/}

^{3/} We are aware of the varying definitions of the phrase "municipal corporation" employed by our Supreme Court over the years. The Court has noted that the definition of the phrase "municipal corporation" "may vary in meaning depending on the time, place, and circumstances under which it is used." City of Olivette v. Graeler, 338 S.W.2d 827, 835 (Mo. 1960).

In State ex rel. Milham v. Rickoff, 633 S.W.2d 733 (Mo. banc 1982), the Court held, with three judges dissenting, that the University of Missouri is not a municipal corporation for purposes of Sections 508.010(2) and 508.050 RSMo 1978 (venue statutes). The Court employed a narrow definition of municipal corporation, holding that for purposes of venue a municipal corporation has a "local nature". Id. at 735. In Laret Investment Co. v. Dickmann, 134 S.W.2d 65 (Mo. banc 1939), the Court chose to define municipal corporation broadly, as a public corporation which performs an "essential public service". In Beiser v. Parkway School District, 589 S.W.2d 277 (Mo. banc 1979), the Court held that a school district is not a "municipality" for purposes of a statute creating an exception to sovereign immunity.

None of the cited cases provides guidance for analyzing the powers granted a body politic and corporate which is a "separate entity". We are convinced, however, that MOHELA's powers must be assessed against the standards provided for municipal corporations in that MOHELA performs an "essential public function". Section 173.360.

Dr. Shaila Aery

Municipal corporations have only such powers as are expressly given them, reasonably implied in their grant of powers or essential to their declared purposes. The Supreme Court has stated:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved against the corporation, and the power is denied.

Taylor v. Dimmitt, 78 S.W.2d 841, 843 (Mo. 1934). See also, State ex rel. Mitchell v. City of Sikeston, 555 S.W.2d 281, 288 (Mo. banc 1977); State ex rel. Taylor v. Land Clearance for Redevelopment Authority of Kansas City, 586 S.W.2d 331, 333 (Mo. banc 1979).

Section 173.385 grants MOHELA authority to act as follows:

The authority shall have the following powers, together with all powers incidental thereto or necessary to the performance thereof:

(1) To have perpetual succession as a body politic and corporate;

* * *

(6) To issue revenue bonds to obtain funds to purchase student loan notes which are guaranteed under sections 173.095 to 173.180, or under the provisions of the federal Higher Education Act of 1965, as amended. . . .

* * *

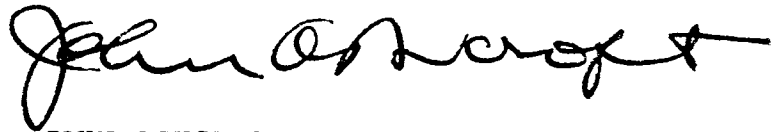
(15) To take any necessary actions to be qualified to issue tax-exempt bonds pursuant to the applicable provisions of the internal revenue code of 1954, as amended.

Dr. Shaila Aery

We have reviewed the statutory grants of authority to the Missouri Health and Educational Facilities Authority, Chapter 360 RSMo 1978 (as amended), the Missouri Housing Development Commission, Chapter 215 RSMo. 1978 (as amended), the Missouri Environmental Improvement Authority, Sections 260.005 to 260.125, Industrial Development Corporations, Chapter 349 RSMo 1978 (as amended), Planned Industrial Expansion Authorities, Section 100.300, et seq., RSMo 1978 (as amended), counties for county housing bonds, Sections 108.450 to 108.470, municipalities for industrial development bonds, Sections 100.010 to 100.200 RSMo 1978 (as amended), and municipalities for tax increment financing, Section 99.800, et seq. Only in the grant of authority to MOHELA is an authority empowered to take actions necessary to issue bonds which are tax-exempt for federal income tax purposes. Section 173.385(15).

Applying the maxim of statutory construction, "expressio unius est exclusio alterius" (express mention of one implies the exclusion of others), Harrison v. M.F.A. Mutual Ins. Co., 607 S.W.2d 137 (Mo. banc 1980), and finding no express or implied power in MOHELA to issue taxable bonds, we are led to the conclusion that the General Assembly did not intend for MOHELA to issue bonds which are taxable for purposes of federal income tax laws.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT
Attorney General